SUPREME COURT OF THE UNITED STATES.

No. 320.

WILLIAM T. O'NEIL, PLAINTIFF IN ERROR,

VS.

JOHN KIRKPATRICK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the United States within and for the district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William T. O'Neil and John Kirkpatrick, a manifest error hath happened, to the great damage of the said William T. O'Niel, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected, the said court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this sixth day of April, A. D. 1866, and of the independence of the United States the ninetieth.

Witness my hand and the seal of the circuit court of the district of California, the 27th day of October, A. D. 1866.

[SEAL.] GEO. C. GORHAM,
Clerk U. S. Circuit Court, Dist. of California.

The above writ of error is hereby allowed.

OGDEN HOFFMAN,
District Judge.

2 UNITED STATES OF AMERICA,
Circuit Court, District of California, ss:

The return to the within writ of error appears by the schedule hereunto annexed.

GEO. C. GORHAM, *Clk.*
By S. NEALL, *D. C.*

Citation.

3 UNITED STATES OF AMERICA, *ss:*

To John Kirkpatrick, greeting:

You are hereby cited and admonished to be and appear at the next term of the Supreme Court of the United States, to be held at Washington, in the District of Columbia, on the 1st Monday of December, A. D. 1866, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of

California, wherein William T. O'Niel is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 27th day of October, A. D. 1866, and of the independence of the United States the ninety-first.

OGDEN HOFFMAN,
District Judge.

4 I admit due service of a copy of the within citation upon me this 29th day of October, A. D. 1866.

DELOS LAKE,
Att'y for Def't.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Samuel Neall, being duly sworn, says he is a white male citizen of the United States, of the age of 21 years and upwards, and that on the 29th day of October, 1866, at the said city and county of San Francisco, he personally served a duplicate of within citation upon Delos Lake, esq., the attorney for the defendant in error herein.

S. NEALL.

Sworn to and subscribed before me, 27th October, 1866.

DANIEL T. SULLIVAN,
U. S. Com'r.

5 In the circuit court of the United States in and for the State of California.

WILLIAM T. O'NEAL, plaintiff,
vs.
JOHN KIRKPATRICK, defendant. } Complaint at law, ejectment.

The plaintiff in the above-entitled action complains of the defendant herein, and for cause of action alleges that said plaintiff is a resident and citizen of the State of Nevada, and that the defendant is a resident and citizen of the State of California, residing in the city and county of San Francisco.

That on the 1st day of October, A. D. 1866, the said plaintiff was, ever since has been, and still is, the owner in fee, and was on that day, ever since has been, and still is, entitled to the possession of all that certain piece or parcel of land or lot of ground, situate, lying, and being in the city and county of San Francisco, State of California, and within this circuit, and known and described as follows, to wit:

Beginning at a point on the westerly line of Kentucky street, distant two hundred and four (204) feet southerly from the south-
6 westerly corner of Kentucky and New Channel streets; thence at right angles to Kentucky street westerly one hundred (100)

feet; thence at right angles southerly and parallel with Kentucky street fifty (50) feet; thence at right angles easterly one hundred (100) feet to said westerly line of Kentucky street; and thence along said line of Kentucky street northerly fifty (50) feet to the place of beginning. Being a lot of ground fifty (50) by one hundred (100) feet, and part of block twenty-five, (25,) as laid down on the map of the city of San Francisco, from surveys by the board of city engineers, under and by virtue of an act of the legislature of the State of California, approved April 26, 1862, and acts supplementary to and amendatory thereof.

That on the tenth day of October, A. D. 1866, the defendant above named wrongfully entered into the possession of the lands and premises above described, and ousted and ejected the plaintiff from the possession thereof, and has since detained and withheld, and still does detain and withhold, the possession thereof from the plaintiff; and said defendant is now, and since the day last aforesaid has been, in the possession thereof.

That the value of said premises is five thousand (5,000) dollars, and the value of the use and occupation thereof is, and has
7 been ever since the said tenth day of October, A. D. 1866, the sum of one thousand dollars per annum, and that the plaintiff has sustained damages by the withholding of said possession by said defendant in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against said defendant, for restoration of the possession of said premises, and damages in the sum of one thousand dollars for the detention thereof, and for the sum of one thousand dollars for the value of the use and occupation thereof, with costs of suit.

SELDEN S. WRIGHT,
Att'y for Pl'ff.

Indorsed: Filed October 13, 1866.

GEO. C. GORHAM, *Clerk.*

8 UNITED STATES OF AMERICA:

In the circuit court of the United States for the district of California.

WILLIAM T. O'NEAL, plaintiff,
vs.
JOHN KIRKPATRICK, defendant.

Action brought in the said circuit court, and the complaint filed in the city and county of San Francisco, in the office of the clerk of said circuit court.

The President of the United States of America, greeting, to John Kirkpatrick:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the circuit court of the United States for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, (a copy of which accompanies this summons,) in the office of the clerk of said court in the city and

county of San Francisco within ten days, (exclusive of Sundays and day of service,) after the service on you of this summons—if served in this county; or if served out of this county, then within forty days—or judgment by default will be taken against you.

The said action is brought to recover the possession of certain real estate, more particularly described in said complaint, and damages in the sum of $1,000, and the sum of $1,000 for use and occupation of said premises; and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 13th day of October, in the year of our Lord one thousand eight hundred and sixty-six, of our independence the 91st.

Attest. GEO. C. GORHAM, *Clerk.* [SEAL.]

U. S. int. rev. stamp, 5 cts., cancelled.

9 OFFICE OF THE MARSHAL OF THE NORTHERN DISTRICT OF CALIFORNIA, *ss:*

I hereby certify that I received the within summons on the seventeenth day of October, A. D. 186 , and personally served the same on the seventeenth day of October, A. D. 1866, by delivering to John Kirkpatrick, said defendant, personally, in the city and county of San Francisco, a copy of said summons, attached to a certified copy of the complaint.

Dated San Francisco, this 17th day of October, A. D. 1866.

CHARLES W. RAND, *Marshal.*
By G. F. WORTH, *Deputy Marshal.*

Filed this 18th day of Oct., 1866.

GEO. C. GORHAM, *Clerk.*
By S. NEALL, *D. C.*

10 In the circuit court of the United States in and for the district of California.

WILLIAM T. O'NEAL, pl'ff,
v.
JOHN KIRKPATRICK, deft.

The defendant, John Kirkpatrick, by Delos Lake, his attorney, for answer to the complaint in this action, denies each and every allegation in said complaint contained.

Oct. 25th, 1866.

DELOS LAKE,
Att'y for Defendant.

Indorsed: Filed Oct. 25, 1866.

GEO. C. GORHAM, *Clk.*
By S. NEALL, *D. C.*

11 In the circuit court of the United States in and for the State of California.

WILLIAM T. O'NEAL, plaintiff,
v.
JOHN KIRKPATRICK, defendant.

This stipulates that the issues of fact in this cause may be tried and determined by the said court without the intervention of a jury, and a jury trial herein is hereby waived.

S. S. WRIGHT,
Plaintiff's Attorney.
DELOS LAKE,
Att'y for Defendant.

Indorsed: Filed Oct. 26, '66.

GEO. C. GORHAM, *Clerk.*

12 In the circuit court of the United States in and for the State of California.

WILLIAM T. O'NEAL, defendant,
v.
JOHN KIRKPATRICK, defendant.

This stipulates and agrees that a trial by jury be waived in the above-entitled cause, and that the same be submitted to the court for decision upon the following statement of facts, which is agreed to as embracing all of the material facts involved in the cause.

First. That the plaintiff, William T. O'Neal, is and was at the time of the commencement of this suit, a resident and citizen of the State of Nevada, and that the defendant, John Kirkpatrick, is and was at the commencement thereof a resident and citizen of California, residing in the city and county of San Francisco.

Second. That the land described in the complaint is situate within the limit of said city and county of San Francisco, (as the same existed April 21, 1858,) State of California, and upon the margin of the Bay of San Francisco, and within the exterior boundaries of
13 the plat and survey made by the county surveyor of the city and county of San Francisco, in compliance with the provisions of the act of the legislature of the State of California, approved May 13th, 1861, entitled "An act to provide for the reclamation and segregation of swamp and overflowed and salt marsh and tide lands donated to the State of California by act of Congress," and is within five miles of the said city, and is below ordinary high-water mark, and west of a certain structure or plank road called "Mission Bay bridge," which said bridge crosses Mission bay, commencing at the foot of Fourth street on the north, thence southerly along the line of said street until it intersects with Kentucky street, and thence along the line of Kentucky street until it reaches the opposite shore of said Mission bay; which said bridge or road was built under and by virtue of an act of the legislature of the State of California, approved April 18th, A. D. 1861, and an act amendatory thereof, approved April

21st, 1863, granting a franchise to certain parties therein mentioned, in which franchise the defendant is in no way interested, and upon which said road or bridge, by an act of the legislature of the State of California, approved April 2d, A. D. 1866, another franchise is granted to keep and maintain a horse railroad for twenty five years, in which franchise the defendant is in no way interested.

14 That the land lying between said bridge and the mainland does not form part of the navigable portion of the Bay of San Francisco, is easily reclaimable, and will soon, by reason of the natural growth of the city, be converted into solid land, and covered with buildings.

That the land described in said complaint forms a part of the land mentioned and described in the certificate of purchase hereinafter set forth, and that the position of said road or bridge and the land described in said complaint are correctly shown in a map or diagram thereof hereto attached as Exhibit A.

That the value of said land in the complaint described, and sought to be recovered, exceeds the sum of five thousand dollars.

Third. That the said defendant is and was at the commencement of this action in the actual possession of the land described in the complaint, and that he entered in the possession thereof adversely to the title claimed by plaintiff, and subsequent to the issuance of the certificate of purchase hereinafter described.

Fourth. That the title or claim of plaintiff, and upon which he seeks to eject the defendant in this action, is founded upon the certificate of purchase hereinafter set forth, and the conveyance to him, said plaintiff, of all the right, title, and interest in said land, which ever were at any time in said Randall, the grantee in said certificate.

15 Fifth. That prior to the date of said certificate of purchase, and at and subsequent to the admission of California as a State into the Union, the State of California, by virtue of her sovereignty, was the owner of the said land described in the complaint, and had authority to dispose of the same for any purpose, public or private.

Sixth. That the appropriation of the lands in the said certificate mentioned and described to private uses does not, and will not, interfere with the commerce or navigation, or work detriment in any manner to the harbor of San Francisco.

Seventh. That the certificate of purchase of which the following is a copy, to wit:

Certificate of purchase.—No. 32.

STATE LAND OFFICE OF THE STATE OF CALIFORNIA,
Sacramento, 23d day of February, 1864.

It appearing from the certificate of the county treasurer, bearing date the 19th day of February, A. D. 1864, that Charles W. Randall has paid to the State of California the sum of $41 60 in payment for

forty-one and 6-100 acres of State salt marsh and tide land, described as follows on survey No. 5, San Francisco county fractional south half of NE. ¼, fractional NE. ¼ of SE. ¼, and fractional NW. ¼ of SE. ¼ of section 10 in township No. 2 and range No. 5 west, Mount Diablo meridian:

Now, therefore, be it known that the said Charles W. Randall having made payment in full for the above-described tract of land under the provisions of an act entitled "An act to provide for the sale and reclamation of the swamp and overflowed lands of this State," passed April 21st, 1858, and the act of May 13th, 1861, and in all other respects complied with the provisions of said acts, is the purchaser of the same, and on presentation of this certificate to the government of the State of California, the said Charles W. Randall, or his assigns, shall be entitled to receive a patent for the same.

In witness whereof the register of said land office has hereunto set his hand and affixed his seal of office, this day and date above-mentioned.

[SEAL.]

J. F. HOUGHTON,
Register of State Land Office.
By A. S. BENDER, *Deputy.*

[In the right-hand margin is written the words "forty-one 6-100 dollars," and in the left-hand margin is written the words "State salt marsh and tide lands."]

Was issued by said register at the date thereof, and on the same day delivered by him to the said Charles W. Randall therein named, for the consideration therein set forth, and that the estate derived therefrom to the said Randall has been duly and legally conveyed to this plaintiff, and is now, and at the commencement of this action was, vested in the plaintiff.

Eighth. That up to the date of the issuance of the said certificate, all the requirements and prerequisites of the various statutes in reference to the survey, segregation, and sale of the swamp and overflowed salt marsh and tide lands had been fully complied with by the several State officers charged with the same, and also by the said Charles W. Randall, the applicant to purchase, including the application, the survey, and the segregation.

Ninth. That the lands mentioned and described in an act of the legislature of the State of California entitled "An act to authorize the sale and conveyance to William Alvord, his associates and assigns, of certain overflowed lands in the city and county of San Francisco," approved April 2d, 1866, are not embraced in the said certificate delivered to said Charles W. Randall, but from a portion of the lands embraced in the exterior boundaries of the said plat and survey made by the county surveyor of the city and county of San Francisco, and referred to in the second subdivision of this agreed statement, and that at and prior to the date of the said act of the legislature, (April 2d, 1866,) the said lands mentioned in the said act had been sold to parties other than said Alvord

or his associates by virtue of similar proceedings, and under the same statutes by and under which said Randall made the purchase, evidenced by the said certificate set out in subdivision number seven hereof, and that neither the said lands mentioned in said act of April 2d, 1866, nor the said land mentioned in the said certificate of purchase to said Charles W. Randall had ever been otherwise conveyed or in any manner disposed of by the State of California.

San Francisco, Oct. 24th, 1866.

SELDON S. WRIGHT,
Att'y for Pl'ff.
DELOS LAKE, *Def'ts Att'y.*

Indorsed: Filed Oct. 26, '66.

GEO. C. GORHAM, *Clerk.*

(Here follows map, marked page 19.)

20 In the circuit court of the United States in and for the State of California.

WILLIAM T. O'NEAL, plaintiff,
v.
JOHN KIRKPATRICK, defendant.

In this cause, a jury trial having been expressly waived by the stipulation in writing of the attorneys of record herein filed with the clerk of this court, and the same having been submitted to the court for decision upon the pleadings and an agreed statement of facts herein filed, and, upon consideration thereof, the court finds the following as the facts of this case:

Finding of facts.

First. That the plaintiff, William T. O. Neal, is, and was at the time of the commencement of this suit, a resident and citizen of the State of Nevada, and that the defendant, John Kirkpatrick is, and was at the commencement thereof, a resident and citizen of California, residing in the city and county of San Francisco.

Second. That the land described in the complaint is situate within the limits of said city and county of San Francisco, (as the same existed April 21, 1858.) State of California, and upon the margin
21 of the Bay of San Francisco, and within the exterior boundaries of the plat and survey made by the county surveyor of the city and county of San Francisco, in compliance with the provisions of the act of the legislature of the State of California, approved May 13th, 1861, entitled "An act to provide for the reclamation and segregation of swamp and overflowed and salt marsh and tide lands, donated to the State of California by act of Congress;" and is within five miles of the said city, and is below ordinary high-water mark, and west of a certain structure or plank road called Mission Ba bridge, which said bridge crosses Mission bay, commencing at th foot of Fourth street on the north, thence southerly along the line

said street until it intersects with Kentucky street; and thence along the line of Kentucky street until it reaches the opposite shore of said Mission bay; which said bridge or road was built under and by virtue of an act of the legislature of the State of California, approved April 18, A. D. 1862, and an act amendatory thereof, approved April 24, 1863, granting a franchise to certain parties therein mentioned, in which franchise the defendant is in no way interested, and upon which said road or bridge, by an act of the legislature of the State of California, approved April 2d, A. D. 1866, another franchise is granted to keep and maintain a horse railroad for twenty-five years, in which franchise the defendant is in no way interested.

That the land lying between said bridge and the main land
22 does not form part of the navigable portion of the Bay of San Francisco, is easily reclaimable, and will soon, by reason of the natural growth of the city, be converted into solid land and covered with buildings.

That the land described in said complaint forms a part of the land mentioned and described in the certificate of purchase hereinafter set forth, and that the position of said road or bridge, and the land described in said complaint, are correctly shown in a map or diagram thereof, hereto attached as Exhibit A.

That the value of said land in the complaint described, and sought to be recovered, exceeds the sum of five thousand dollars.

Third. That the said defendant is, and was at the commencement of this action, in the actual possession of the land described in the complaint, and that he entered in the possession thereof adversely to the title claimed by plaintiff, and subsequent to the issuance of the certificate of purchase hereinafter described.

Fourth. That the title or claim of the plaintiff, and upon which he seeks to eject the defendant in this action, is founded upon the certificate of purchase hereinafter set forth, and the conveyance to him, said plaintiff, of all the right, title, and interest in said land, which ever were at any time in said Randall, the grantee in said certificate.

23 Fifth. That prior to the date of the said certificate of purchase, and at and subsequent to the admission of California as a State into the Union, the State of California, by virtue of her sovereignty, was the owner of the said land described in this complaint, and had authority to dispose of the same for any purpose, public or private.

Sixth. That the appropriation of the lands in the said certificate mentioned and described does not and will not interfere with the commerce or navigation, or work detriment in any manner to the harbor, of San Francisco.

Seventh. That the certificate of purchase of which the following is a copy, to wit:

or his associates by virtue of similar proceedings, and under the same statutes by and under which said Randall made the purchase, evidenced by the said certificate set out in subdivision number seven hereof, and that neither the said lands mentioned in said act of April 2d, 1866, nor the said land mentioned in the said certificate of purchase to said Charles W. Randall had ever been otherwise conveyed or in any manner disposed of by the State of California.

San Francisco, Oct. 24th, 1866.

SELDON S. WRIGHT,
Att'y for Pl'ff.
DELOS LAKE, *Def'ts Att'y.*

Indorsed: Filed Oct. 26, '66.

GEO. C. GORHAM, *Clerk.*

(Here follows map, marked page 19.)

20 In the circuit court of the United States in and for the State of California.

WILLIAM T. O'NEAL, plaintiff,
v.
JOHN KIRKPATRICK, defendant.

In this cause, a jury trial having been expressly waived by the stipulation in writing of the attorneys of record herein filed with the clerk of this court, and the same having been submitted to the court for decision upon the pleadings and an agreed statement of facts herein filed, and, upon consideration thereof, the court finds the following as the facts of this case:

Finding of facts.

First. That the plaintiff, William T. O. Neal, is, and was at the time of the commencement of this suit, a resident and citizen of the State of Nevada, and that the defendant, John Kirkpatrick is, and was at the commencement thereof, a resident and citizen of California, residing in the city and county of San Francisco.

Second. That the land described in the complaint is situate within the limits of said city and county of San Francisco, (as the same existed April 21, 1858.) State of California, and upon the margin
21 of the Bay of San Francisco, and within the exterior boundaries of the plat and survey made by the county surveyor of the city and county of San Francisco, in compliance with the provisions of the act of the legislature of the State of California, approved May 13th, 1861, entitled "An act to provide for the reclamation and segregation of swamp and overflowed and salt marsh and tide lands, donated to the State of California by act of Congress;" and is within five miles of the said city, and is below ordinary high-water mark, and west of a certain structure or plank road called Mission Bay bridge, which said bridge crosses Mission bay, commencing at the foot of Fourth street on the north, thence southerly along the line

said street until it intersects with Kentucky street; and thence along the line of Kentucky street until it reaches the opposite shore of said Mission bay; which said bridge or road was built under and by virtue of an act of the legislature of the State of California, approved April 18, A. D. 1862, and an act amendatory thereof, approved April 24, 1863, granting a franchise to certain parties therein mentioned, in which franchise the defendant is in no way interested, and upon which said road or bridge, by an act of the legislature of the State of California, approved April 2d, A. D. 1866, another franchise is granted to keep and maintain a horse railroad for twenty-five years, in which franchise the defendant is in no way interested.

That the land lying between said bridge and the main land
22 does not form part of the navigable portion of the Bay of San Francisco, is easily reclaimable, and will soon, by reason of the natural growth of the city, be converted into solid land and covered with buildings.

That the land described in said complaint forms a part of the land mentioned and described in the certificate of purchase hereinafter set forth, and that the position of said road or bridge, and the land described in said complaint, are correctly shown in a map or diagram thereof, hereto attached as Exhibit A.

That the value of said land in the complaint described, and sought to be recovered, exceeds the sum of five thousand dollars.

Third. That the said defendant is, and was at the commencement of this action, in the actual possession of the land described in the complaint, and that he entered in the possession thereof adversely to the title claimed by plaintiff, and subsequent to the issuance of the certificate of purchase hereinafter described.

Fourth. That the title or claim of the plaintiff, and upon which he seeks to eject the defendant in this action, is founded upon the certificate of purchase hereinafter set forth, and the conveyance to him, said plaintiff, of all the right, title, and interest in said land, which ever were at any time in said Randall, the grantee in said certificate.

23 Fifth. That prior to the date of the said certificate of purchase, and at and subsequent to the admission of California as a State into the Union, the State of California, by virtue of her sovereignty, was the owner of the said land described in this complaint, and had authority to dispose of the same for any purpose, public or private.

Sixth. That the appropriation of the lands in the said certificate mentioned and described does not and will not interfere with the commerce or navigation, or work detriment in any manner to the harbor, of San Francisco.

Seventh. That the certificate of purchase of which the following is a copy, to wit:

Certificate of purchase.—No. 32.

STATE LAND OFFICE OF THE STATE OF CALIFORNIA,
Sacramento, 23d day of February, 1864.

It appearing from the certificate of the county treasurer, bearing date the 19th day of February, A. D. 1864, that Charles W. Randall has paid to the State of California the sum of $41 06 in payment for (41 6-100) forty-one and 6-100 acres of State salt marsh and tide land described as follows, in survey No. 5, San Francisco
24 county: fractional south half of NE. ¼; fractional NE. ¼ of SE. ¼; and fractional NW. ¼ of SE. ¼ of section 10 in township No. 2, and range No. 5 west, Mount Diablo meridian:

Now, therefore, be it known that the said Charles W. Randall, having made payment in full for the above-described tract of land, under the provisions of an act entitled "An act to provide for the sale and reclamation of the swamp and overflowed lands of this State," passed April 21, 1858, and the act of May 13th, 1861, and in all other respects complied with the provisions of said acts, is the purchaser of the same, and on presentation of this certificate to the governor of the State of California, the said Charles W. Randall, or his assigns, shall be entitled to receive a patent for the same.

In witness whereof the register of said land office has hereunto set his hand and affixed his seal of office, this day and date above mentioned.

[SEAL.] J. T. HOUGHTON,
Register of State Land Office.
By A. S. PENDER, *Deputy.*

[In the right-hand margin is written the words "forty-one 6-100 dollars," and in the left-hand margin is written the words "State salt marsh and tide lands."]

Was issued by said register at the date thereof, and on the same day delivered by him to the said Charles W. Randall therein
25 named, for the consideration therein set forth, and that the estate derived therefrom to the said Randall has been duly and legally conveyed to this plaintiff, and is now, and at the commencement of this action was, vested in the plaintiff.

Eighth. That up to the date of the issuance of the said certificate all the requirements and prerequistes of the various statutes in reference to the survey, segregation, and sale of the swamp and overflowed salt marsh and tide lands, had been fully complied with by the several State officers charged with the same, and also by the said Charles W. Randall, the applicant to purchase, including the application, the survey, and the segregation.

Ninth. That the lands mentioned and described in an act of the legislature of the State of California entitled "An act to authorize the sale and conveyance to William Alvord, his associates, and assigns, of certain overflowed lands in the city and county of San Francisco," approved April 2, 1866, are not embraced in the said certi-

ficate delivered to said Charles W. Randall, but form a portion of the lands embraced in the exterior boundaries of the said plat and survey made by the county surveyor of the city and county of San Francisco, and referred to in the second subdivision of this agreed statement; and that at and prior to the date of the said act
26 of the legislature (April 21, 1866) the said lands mentioned in the said act had been sold to parties other than said Alvord or his associates, by virtue of similar proceedings, and under the same statutes by and under which said Randall made the purchase evidenced by the said certificate set out in subdivision number seven hereof, and that neither the said lands mentioned in said act of April 2d, 1866, nor the said land mentioned in the said certificate of purchase to said Charles W. Randall had ever been otherwise conveyed or in any manner disposed of by the State of California; and as a conclusion of law the court finds, from the foregoing facts, that the plaintiff is not entitled to recover the premises demanded in his complaint, and the defendant is entitled to judgment against the plaintiff for costs of this action, and that judgment be entered accordingly.

San Francisco, Oct. 26th, 1866.

OGDEN HOFFMAN,
Dist. Judge.

Indorsed: Filed Oct. 26, '66.

GEO. C. GORHAM, *Clerk.*

27 (Here follows map, marked page 26.)

28 Circuit court of the United States, district of California.

WILLIAM T. O'NEAL
vs.
JOHN KIRKPATRICK.

This cause having heretofore, to wit, on the 26th day of October, A. D. 1866, come on for trial by the court, without the intervention of a jury, by the stipulation in writing of the attorneys of the respective parties filed with the clerk, and the case having been submitted upon an agreed statement of facts in writing, and argument of counsel having been heard thereon, and the court, after duly considering the same, having filed its findings, and ordered that judgment be entered in accordance therewith in favor of the said defendant, with costs:

Now, therefore, it is ordered and adjudged that the said plaintiff take nothing by reason of his said action; that the said defendant go hence without day, and that he have and recover of and
29 from the said plaintiff his costs of suit, taxed at dollars.

OGDEN HOFFMAN,
Dist. Judge.

30 In the circuit court of the United States in and for the State of California.

WILLIAM T. O'NEAL, plaintiff,
vs.
JOHN KIRKPATRICK, defendant.

Be it remembered, that the issues of fact in this cause having been (by stipulation of the attorneys of the respective parties heretofore filed with the clerk) duly submitted to the court for trial and determination without the intervention of a jury, and the court having found the facts in said cause appearing in the record herein as the facts found by said court, and which said facts so found are now here made part of this bill of exceptions; thereupon the said court adjudged and determined that the plaintiff upon the said facts so found, is not entitled to recover of the defendant the premises in the complaint demanded; and that the defendant recover of the plaintiff the costs of this suit; and directed that judgment be entered accordingly, to which decision and judgment of the court the plaintiff at the time duly excepted, and tenders this his bill of exceptions, which
31 he prays may be signed, sealed, and made part of the record, which is now done accordingly.

Dated October 26th, 1866.

OGDEN HOFFMAN, *Dist. Judge.*

Indorsed: Filed October 26, 1866.

GEO. C. GORHAM, *Clerk.*

32 UNITED STATES OF AMERICA,
Circuit Court, District of California, ss:

I, George C. Gorham, clerk of the circuit court of the United States in and for the district of California, do hereby certify that the foregoing thirty-three pages in manuscript contain a true, full, and correct transcript of the record and proceedings in the case in said circuit court, entitled "William T. O'Niel *vs.* John Kirkpatrick," as the same remains of record and on file in the clerk's office of said circuit court.

Witness my hand and seal of said circuit court, this 29th day of October, A. D. 1866.

[SEAL.]

GEO. C. GORHAM, *Clerk.*
By DAN. T. SULLIVAN, *Deputy.*

[5-ct stamp, cancelled.]

33 Supreme Court of the United States.—December term, A. D. 1866.

WILLIAM T. O'NEAL, plaintiff in error,
vs.
JOHN KIRKPATRICK, defendant in error.

Stipulated that this cause be submitted to the court for decision at the present term upon the printed arguments on file.

Stipulated further, that the statutes of the State of California referred to in the record or in the printed arguments may be read from the book known as Hittell's Digest of the Statute Law of California.

GREGORY YALE,
For Pl'ff in Error.
DELOS LAKE,
Att'y for Deft. in Error.

Filed 3d December, 1866.

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66
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No. X

IN THE

SUPREME COURT

OF THE UNITED STATES.

WM. T. ONEALE,
Plaintiff in Error,

vs.

JOHN KIRKPATRICK,
Defendant in Error.

Argument for the Plaintiff in Error.

GREGORY YALE,
For Plaintiff in Error.

SAN FRANCISCO:
M. D. Carr & Co., Printers, 411 Clay Street.
1866.

IN THE

SUPREME COURT

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UNITED STATES.

December Term, 1866.

WM. T. ONEALE,
Plaintiff in Error,

vs.

JOHN KIRKPATRICK,
Defendant in Error.

ARGUMENT FOR THE PLAINTIFF IN ERROR.

The following propositions are conceded:

1. The land in controversy was the property of the State of California, by virtue of her sovereignty.

2. The State had the right of disposition.

3. The lands fall under the description of *tide lands*, and are reclaimable.

The dry question at issue is whether the plaintiff acquired the title of the State.

The plaintiff claims title by virtue of a certificate of purchase issued by the Register of the State land office, under the laws then and now in force, and by an Act of this State made evidence of title. The Act is as follows:

"SECTION 1. The certificate of purchase or of location of any lands in this State, issued or made in pursuance of any of the laws of the United States, or of this State, shall be deemed *prima facie* evidence of legal title in the holder of said certificate of purchase or location, or his assignees."

This Act underwent judicial construction in the case of Richter vs. Riley, 22 Cal. R. 639. The certificate of purchase was there held to be *prima facie* evidence of legal title in the plaintiff, and admissible as evidence in an action of ejectment.

There was no contest upon any of the foregoing propositions in the Court below. They were conceded generally, and the struggle was confined to the question whether there was any authority under the laws of California to purchase the land in controversy.

The defence insists—

1. That the land in question, and all tide lands within a given distance of San Francisco, are and were excluded from sale.

2. That there was no authority for selling any tide lands.

We deny these positions, and will show by an

exposition of the legislative authority under which the plaintiff claims that he has the title.

We will first premise that the Supreme Court of California, in its construction of the State laws, have classified the lands to be discussed as follows:

1. "Swamp and overflowed lands," mean the lands given to the State by Congress under the Arkansas Act.

2. "Tide lands" mean the lands below high water mark, which belong to the State by virtue of her sovereignty. People vs. Morrill, 26 Cal. R. 336.

We are forced to concede that there was no authority to sell the TIDE lands until the passage of the Act of May 13, 1861, (Hittell's California Laws, §4115,) because the Supreme Court of the State has so decided in the case of the People vs. Morrill, above cited, and because we know that the Supreme Court of the United States has made it an inflexible rule to follow the decisions of the highest courts of the States in the construction of State Statutes.

Acting, then, upon this theory, we find the authority under which the plaintiff claims, to consist of the Act before mentioned, and which is entitled "An Act to provide for the reclamation and segregation of swamp and overflowed and salt marsh and tide lands donated to the State of California by Act of Congress. (Hittell, §4115.)

The Court will observe that the title is awkward in the respect that no such thing as "tide lands" were ever or could be donated by Congress; and

the Legislature which passed the Act seemed to have entertained a suspicion as to its liability to a disputed construction, for to prevent any such result, and place their intention beyond the possibility of doubt, they provided in the 27th Section as follows :

"SECTION 27. The provisions of this Act shall apply equally to ALL salt, marsh or TIDE lands in this State as to swamp and overflowed."

Thus far we contend that we are authorized to claim two facts which are beyond contradiction:

1. That *tide lands* were one of the objects of the law.

2. That "ALL" "tide lands in this State" were alike affected by the operation of the Act.

We now turn to the Act. The first eighteen sections organize the framework of a system of reclamation, and contain nothing reflecting upon the question at issue. Then the 19th Section provides as follows :

"The County Surveyors of the several counties of this State shall, immediately after the organization of the Board of Commissioners proceed to segregate the swamp and overflowed lands within their respective counties, from the high lands in said counties, and make complete maps of all the swamp and overflowed lands within their respective counties, in legal subdivisions of sections and parts of sections, together with a tabular statement of all such lands as have been sold by the State, and under what Act the same were sold, of all lands claimed and by whom claimed, and as nearly as possible by what title the same are held, and file the said tabular statement in the County Recorder's office of the respective counties ; also transmit duplicates of said maps to the Surveyor General of the State," &c.

We stop here to make two undeniable propositions arising from this Section:

1. It applies to ALL the counties of the State, and consequently SAN FRANCISCO is NOT excluded.

2. Whenever the words "swamp and overflowed" occur, we are entitled to have read the word "TIDE," under the authority of Section 27, already quoted.

We NOW call attention to the consideration of Section 26, which is as follows:

"SECTION 26. After the survey by sections, and the segregation contemplated by this Act has been made, ANY PERSON *desirous of purchasing swamp and overflowed lands*, shall file an affidavit in the office of the County Surveyor of the county in which the land is situate, that he has not purchased any other land under the provisions of any Act to provide for the sale of swamp and overflowed lands belonging to this State, which, with the lands sought to be purchased, shall exceed six hundred and forty acres; that he has no knowledge of any other legal or equitable claim than his own to the tract of land desired to be purchased by him. It shall be the duty of the County Surveyor to make out a plat and field notes for each applicant, from the map on file in his office, and forward a certified copy of the same to the Surveyor General, in accordance with an Act to provide for the sale of swamp and overflowed lands of this State, approved April 18th, A. D. 1859."

This section is all that is afforded by the Act of May 13, 1861, in the way of procedure, for the purpose of purchasing lands under it, and that is given as the reason by the defence why they say there was no authority to sell.

On the other hand, our construction—and we think the plain and evident one—is that after providing in Section 26, for applications to pur-

chase, and affording the initial steps of the proceedings necessary, the applicants are then remitted to the provisions of the Act of 1859, which was amendatory of the Act of 1858.

But it is said that the Acts of 1858 and 1859, (Hittell, § 4081,) were not intended to apply to the sale of tide lands; and therefore, it is denied that the applicant under the Act of 13th May, 1861, for the purchase of tide land, can have the benefit of the rules of proceedure under the Acts of 1858 and 1859. But a sufficient answer to this is that if denied to tide lands, they must also be denied to swamp and overflowed lands; and there would then be no method of selling the latter, because the initial steps for selling them provided by the Act of 1861, differs from those provided by the Act of 1859; and in so far operates as a repeal of that part of the Act of 1859. Again, it can hardly be supposed, and we think will not be argued that the Legislature intended to have two different systems for the sale of the same class of lands; a course which would produce most unusual and complicated accounts in the public offices charged with the business. And it would have been a vain thing for the law to have gone as far as it does in Section 26, towards the sale of the lands, (that particular Section looking to that object alone,) and then to have stopped short leaving it inefficacious for any purpose whatever. No just construction will attribute such an empty headed design to any Legislative Act, if there is a possible

escape from such a barren conclusion. If we subject that section to analysis, we find it contains—

1. An invitation to purchasers to come forward, and an offer by the State to sell to them.

2. The form of affidavit to verify that the applicant belongs to the class who are permitted to purchase.

3. Direction to the County Snrveyor to make out a plat and field notes for the applicant.

4. Direction to the same officer to forward a certified copy of the same to the Surveyor General, in accordance with the Act of 1859.

Now, the question arises, "*cui bono?*" For what was all this to be done? What purpose was to be accomplished? The defence say, "none whatever;" they contend that it was all a mere invitation to the citizen to incur labor, trouble and expense, and meet with disappointment and delusion.

We, on the contrary, insist that in this Act of May 13, 1861, the Legislature engrafted "tide lands" upon what was the first object of the bill to wit, "swamp and overflowed lands;" and then for the remainder of the proceedings to effect purchases left the applicants for either class to the provisions of the Acts of 1858 and 1859; and this seems to be distinctly pointed out by the closing words of Section 26.

We, therefore urge that the two Acts are strictly cognate—that the fact of engrafting the provision for selling "tide lands" upon the latter, does not alter its character in this respect, so as to tear it away from the system of Acts to which it belongs;

and that the two are to be construed in *pari materia*, as parts of one general plan; and that if either standing by itself shall be afflicted with inherent inefficiency or want of purpose, it must be aided and supported by the other.

Following this rule, the applicant to purchase will take up the Act of 1859, and beginning at the point of action where the Act of 1861 leaves off, and which commences with Section 4, of the Act of 1859, will find abundant provisions for the attainment of his end. (See Act of 1859, incorporated with Act of 1858—Hittell, § 4081.)

The Court is so familiar with the rules of law upon the construction of statutes, that it would be inflicting it with tediousness to go through the vast range of authorities which support our positions; and we therefore confine ourselves to a few quotations. We cite the following from Dwarris on Statutes, pp. 568, 569, of the English edition of 1848:

"As one part of a Statute is properly called in to help the construction of another part, and is fitly so expounded as to support and give effect if possible to the whole; so is the comparison of one law with other laws made by the same legislature, or upon the same subject or relating expressly to the same point enjoined for the same reason and attended with a like advantage. In applying the maxims of interpretation the object is throughout, first to ascertain by legitimate means; and next to carry into effect: the intentions of the framer. It is to be inferred that a code of statutes relating to one subject, was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. It is therefore an established rule of law that all acts in *pari materia* are to be taken together as if they were

one law; and they are directed to be compared in the construction of statutes because they are considered as framed upon one system and having one object in view."

"When an action founded upon one statute is given by a subsequent statute in a new case, everything annexed to the action by the first statute is likewise given. Indeed the latter Act may be considered as incorporated with the former."

In Rex v. Loxdale, 1 Burr R., 447, Lord Mansfield said: "Where there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other."

And the following quotation from Dwarris, p. 570, cites the case of Wallis v. Hodson, Barnardiston's Chancery R., 276:

"The 22 and 23 Car. 2 c. 10, for the better settling of intestates estates is continued with some additional clauses by the 1 Jac. c. 17. It was holden by Lord Hardwicke, Chancellor, that for this reason the latter statute must be construed as if the former had been therein recited."

Sometimes, Courts are aided by legislative construction, and where there is any doubt, they lay great stress upon the view taken of it by the legislature, as evinced in subsequent acts. We will now see what was the course of practice of the authorities under the Act of March 13, 1861, and how it was regarded by subsequent legislatures.

The Court will bear in mind that the point made against the appellant is, that the Act provided no procedure for sale of the lands embraced in its

provisions, and therefore there could be no sales under it.

The succeeding legislature, in less than a year from the passage of the Act of March 13, 1861, passed an Act supplementary to that Act. (See Hittell, § 4143.

This supplementary Act provides that "the money then in, or thereafter received in, the swamp land fund, as having been paid by purchasers of land within the district thus certified, less the amount expended in the survey, shall be set apart by the Controller and Treasurer of State from the swamp land fund, as a special fund to the credit of such district, to be applied in the reclamation of said district, as is provided in the Act to which this is supplemental; provided, that in no case shall more than one dollar for each acre of the swamp, TIDE or marsh land in such district be thus set apart from the swamp land fund, excepting that where more than one dollar is paid, the whole sum so paid shall be thus set apart," &c.

Here is legislation in a supplemental Act, providing a disposition for the funds arising from the sales already made and to be made under the original Act.

So the Act of April 10, 1862, (Hittell, § 4154) remits the interest due on all sales of swamp and overflowed, TIDE and marsh lands.

To the same effect is the Act of March 31, 1863. (Hittell, § 4158.)

And the Act of April 27, 1863 (Hittell, § 4160)

provides: "All parties holding certificates of purchase for salt, marsh and TIDE lands belonging to this State, any portion of which is subject to overflow by high tides, and purchased under any Act that has been passed for the sale of the same," may petition for the same to be reclaimed.

Also, the Act of April 4, 1864, (Hittell, § 4180) provides: "Upon the segregation of a swamp land district by the Board of Swamp Land Commissioners, under the provisions of an Act entitled 'An Act to provide for the reclamation and segregation of swamp and overflowed and salt marsh and tide lands donated to the State of California by Act of Congress,' approved May 13, 1861, and under the provisions of the several Acts supplemental and amendatory thereto, and upon the certificate of the said Board of Commissioners, as required in said Acts, being filed with the Controller and Treasurer, the total amount of money in the swamp land fund belonging to a district thus certified is hereby set apart and appropriated to be expended in the reclamation of said district."

All of these Acts go to show that, after the passage of the Act of May 13, 1861, and the surveys made under its authority, it became the common habit of the officers of the government to sell and recognize sales under this Act; from which sales accrued money and securities paid into the swamp land fund, which money and securities were disposed of and dealt with by the Legislature with a full knowledge of the sources from which they arose.

II.

We now approach the consideration of two other Acts of the Legislature, which are relied upon by the defence as operating a repeal of the Act of May 13, 1861, in so far as it may permit the sale of tide lands within five miles of the city of San Francisco.

The first of these two Acts was passed May 14, 1861, the day after the passage of the Act we rely on (Hittell, § 4153). It confirms sales of tide lands theretofore made under Acts for the sale of swamp and overflowed lands, and allows any of them remaining unsold to be sold under the same laws; "provided, no marsh or tide lands located within five miles of the city of San Francisco or of the city of Oakland, or within one and a half miles of the State Prison grounds at Point San Quentin, shall be sold or purchased by authority of this Act."

The second of these two Acts was passed April 27, 1863, entitled "An Act to provide for the sale of certain lands belonging to this State." (Hittell, § 4185.)

This latter Act provides for the sale of every class of lands belonging to the State, and closes thus:

"SECTION 30. This Act shall not apply to the marsh and tide lands upon the city front, and within five miles of the city and county of San Francisco and of the city of Oakland, and one mile of the State prison at San Quentin."

"SEC. 31. All Acts and parts of Acts in conflict with the provisions of this Act, are hereby repealed."

Assuming that we have established the right of purchasing the San Francisco tide lands, by virtue of the provisions of the Act of May 13, 1861, standing by itself, no language could be better framed than that used in the two Acts now under consideration, to exclude the conclusion that the right had been taken away by them.

The first says, "No San Francisco tide land shall be sold or purchased by authority of this Act," a negative most pregnant with the affirmation, that the right was to be exercised under some other Act. How easy it would have been to have halted at the word "purchased," if the intention was not to sell at all.

The language of the Act of 1863 is, "this Act shall not apply to" the San Francisco tide lands.

The meaning is evidently the same as that of the Act just before quoted, that is negatively "San Francisco tide lands shall not be purchased by authority of this Act;" therefore affirmatively "they may be purchased under the authority of any other Act which applies to them." The phrase "this Act shall not apply," surely cannot be tortured into meaning "this Act repeals every other Act which does apply," &c.

And here we remark, in this instance also it would have been easy to prohibit the sales of these lands, if such had been the intention. And we think it a fair and strong deduction, that where the Legislature had the opportunity so often by having the subject before it to be dealt with, not only failed to prohibit, but seemed to have selected

ingenious and decorous terms to avoid such a result, its intention to permit the sales to go on under the prior Act is as clear as if it was express and affirmative.

As for the repealing clause, that is confined to such Acts and parts of Acts as are in conflict with it, but as the Act excludes its application or operation from the San Francisco tide lands, there is no conflict between it and the Act of May 13, 1861, and consequently it does not repeal that Act, or such part of it as concerns the subject matter.

Now if the Court will refer to the Act of April 4, 1864, (Hittell, § 4180,) hereinbefore quoted, it will see a piece of legislation referring solely to the Act of May 13, 1861, and "the Acts supplemental and amendatory thereto," and distinctly recognizing the same to have been then in full force, and anticipating *future* action under it.

A Legislative exposition so decided cannot fail to be regarded with great consideration in passing upon a question of repeal by implication.

We now quote a few authorities to show that such repeals are not permitted by the rules of law.

Dwarris on Statutes, p. 533, (2d Eng. edition.)

"Nor hath a latter Act of Parliament ever been construed to repeal a prior Act, unless there be a contrariety or repugnancy in them, or at least some notice taken of the former Act, so as to indicate an intention in the lawgiver to repeal it."

"Neither is a bare recital in a statute without a clause of repeal sufficient to repeal the positive provisions of a former statute."

"The law does not favor a repeal by implication,

unless the repugnance be quite plain; and such repeal carrying with it a reflection on the wisdom of former Parliaments, it has ever been confined to repealing as little as possible of the preceding statute. Although these two Acts of Parliament are seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not be a repeal of the former by implication. The same view has been taken where powers under several Acts are such as may well subsist together."

"A subsequent Act, too, which can be reconciled with a former Act, shall not be a repeal of it, though there be negative words, as the 1 and 2 Ph. and M., c. 10, that all trials for treason shall be according to the course of the common law, and not otherwise, does not take away, 35 Hen. 8, c. 2, for trial of treason beyond sea."

See also—

Smith's Commentaries, §757, 758.
Sedgwick on Stat. and Coast law, p. 123.

But it may be asked if it was the intention of the Legislature to sell the San Francisco tide lands, by virtue of the Act of May 13, 1861, why are they so carefully excluded from the operation of these two acts, which together provide for the sale of all the other lands.

The question is pertinent and the answer is decisive. The Act of May 13, 1861, will be found upon examination to provide a scientific and labored system for survey, reclamation and segregation. A Board of Commissioners were constituted, an engineer was to be employed, county surveyors were to survey and segregate, maps and field notes were to be made, and duplicates filed, indeed it gives the framework of a vast machinery, compli-

cated in its details and necessarily sluggish in its accomplishment; a system doubtless well suited to the care and caution which are essential in dealing with the condition of an important port, but too embarrassing and procrastinating for the vast extent of interior river and swamp lands which were to be turned into fields and pastures.

So it turned out that almost immediately, indeed the next day after the passage of that Act, another was passed, allowing all other tide lands than those near the ports to be purchased under prior laws. Now these prior laws, as well as the Act of 27th April, 1863, have no provisions for segregation, &c., as has the Act of May 13, 1861, but on the other hand they permit any citizen desirous of purchasing, to make his own selection, obtain a survey, with plat and field notes, by the County Surveyor, pay the price, and the title follows.

It required but very little prevision to determine that the plan which was best adapted for agricultural lands, was unsuitable to the condition and necessities of a commercial port. There the important considerations arise as to the manner in which reclamation will affect the harbor, change the courses of the currents, produce destructive shoaling in deep water, and drive out into the bay the frontage of the land, so as utterly to destroy the drainage of the city, so essential to the health of its population. To permit any one, according to his own fancy, caprice or interest, to select and have surveyed whatever he may choose to claim or consider as the shallows of the bay, without

limitation or restriction, without rule or system, is so palpably dangerous, and would necessarily produce such injurious results as makes it look like supererogation to urge the argument.

And yet such would have been the case if these San Francisco tide lands had not been in direct terms excluded from the operation of the Acts of May 14, 1861, and April 27, 1863.

We think that the Legislature exhibited great wisdom—

1. In permitting and enabling these city lands to be purchased, because no reason can be shown why they should not be subjected to private ownership, and every sound reason concurs why they should.

2. In fixing their extent and governing, regulating and limiting their sales, by the thoroughly digested machinery of the Act of May 13, 1861, and in the firmness they have shown on all subsequent occasions in adhering to this wholesome plan.

III.

The defence have cited and relied much on the case of The People v. Morrill, 26 Cal. R., 336, and insist it is an authority against us.

We do not see it, and can only explain the fatuity of counsel, by supposing they read the syllabus of the reporter, and failed to examine the opinion of the Court.

One of the head notes to this case does read: "no provision has been made by law for the sale of the lands owned by this State by virtue of its

sovereignty on the shore of the sea, and its bays and inlets which are usually overflowed by the neap tides;" but there is nothing in the opinion of the Court which warrants any such conclusion.

We are sure that case does not affect this in any degree, and we will be sustained in this view by making one quotation. We claim, reccollect! under the Act of May 13, 1861.

In speaking of that Act, the opinion at page 357 says:

> "The Act of May 13, 1861, entitled 'An Act to provide for the reclamation and segregation of swamp and overflowed land and salt marsh and tide lands, donated to this State by Act of Congress,' has no bearing upon the question of the validity of the defendant's purchase, for the only purchases it provides for, not only lie in the future, but are to be made after the segregation contemplated by the Act; and it may be added that the record shows that defendant did not purchase with any reference to that Act, nor does the argument of counsel claim that he did."

This quotation not only destroys the illusion which the defence indulged in, but in recognizing that in the future, lands were to be sold under that Act, it supports in so far the theory of our case.

The land which was in controversy in that case, is described as being on the coast extending into the ocean to a depth at ten chains from shore, sufficient for any class of vessels, and beyond that to a depth of sixty to one hundred fathoms.

The Court in considering whether there was authority to sell this under the Act of 14 May, 1861, comes to an adverse conclusion to the sale under that Act, because that Act only enables tide lands

to be purchased by virtue of the Acts then in force, for the sale of "swamp and overflowed lands." These were the Acts of 1858 and 1859. But as it was necessary in order that they should buy under those Acts, to adopt the form of procedure in them provided; and as the Court held that the affidavit prescribed in those Acts, was a part of the procedure; and because the affidavit required the applicant to state that "the land sought to be purchased, is the greater part swamp or swampy, or subject to innundation at the planting, growing or harvesting seasons, so as to endanger, injure or destroy the crops," etc.; therefore, the Court held that the character of tide lands intended to be sold under the Act of May 14, 1861, were such only as fitted the affidavit of proceedure contained in the Acts of 1858 and 1859, and must therefore, be reclaimable lands—which was not the case with the land then under consideration. This is the substance of the decision, and it cannot have any effect upon the case at bar for several reasons.

1. The land here was purchased under a different Act, and that has undergone no construction except what is favorable to our views.

2. Although by a proper construction of the Act of May 13, 1861, we were remitted to the course of proceeding for purchase as contained in the Act of 1859, yet the affidavit of the Act of 1859 was no part of it, because the Act of May 13, 1861, provided its own affidavit, and nothing contained therein indicates the uses to which the land shall

be put, or fixes or limits the objects for which it may be bought.

3. The record in this cause shows that the land involved in this suit is reclaimable.

IV.

But it has been said, that as the Legislature had always carefully excluded these tide lands from sale, prior to the Act of 1861, that Act must be construed to be a part of the system adopted theretofore, and must consequently be held to continue the exclusion.

We think we can show that there is neither force nor plausibility in this position, nor even an accurate statement of fact.

The truth is, that up to the passage of the Act of May 13, 1861, there was no provision whatever for the sale of tide lands, as has been decided by the Supreme Court of California in The People v. Morrill. Therefore it is not true that there was any exclusion of a part of them from sale. The Legislature had simply failed to deal with them, for the time being.

It is true that, in dealing with "*swamp and overflowed lands*," the system commenced by the lawmakers was narrow and exclusive as to that class of lands, the reason for it being, as then avowed, to prevent monopoly; to prevent vast bodies of valuable agricultural land from falling into the hands of a few persons, as it was apt to do, in the then sparse condition of the population of the State.

All this has nothing to do with tide lands, and no similar reason can justly be applied to them. But even in regard to swamp and overflowed lands, the exceptional policy which was at first inaugurated was gradually relaxed, as time and the growth and consequent necessities of the country demanded.

So we find that in the first Act allowing them to be purchased, to wit: the Act of April 28, 1855 (Hittell, § 4058,) not only were all the lands of this kind within given distances of all the towns of the State excluded, but also all the lands lying within one mile of the Sacramento river, from its mouth to the mouth of Feather river, a distance of nearly two hundred miles by the course of the river, and containing, doubtless, the principal body of swamp and overflowed lands within the limits of the State, and certainly the most available.

This remained unchanged until the passage of the Act of April 21, 1858, (Hittell, § 4081,) when the exclusion was removed as to the Sacramento river lands; also, as to lands within five miles of the cities of Sacramento and Marysville; also, as to lands within one mile of any incorporated town or city, and the exclusion was confined to San Francisco, San Diego, Oakland, and within the limits of any incorporated city or town.

It will thus be seen, that, within a period of three years, the necessities resulting from increased population and settlement had relaxed the policy of the Legislature so as to produce a removal of the restriction upon the sale of more than ninety-

nine one-hundredths (99-100) of the land excluded by the former Act.

This remained unchanged until the passage of the Act of May 13, 1861, a period of four years, when the same causes operating, as produced the extensive liberality of the Act of '58, as is a fair and just presumption, the exclusion from sale of any swamp and overflowed lands was entirely removed, and for the first time tide lands were deemed of enough importance to be placed in the category of lands which were to be surveyed, segregated and sold, and without any regard to locality whatever.

Nor has any subsequent Act of Legislation attempted to renew or impose any of the old restrictions.

Nor has the Legislature been at all chary about parting with the tide lands in the city of San Francisco.

The record in this case shows one grant of these lands to William Alvord by the Legislature of 1866.

Another grant of a considerable body was made to the Golden City Homestead Association, April 4, 1864.

Acts of 1863–64, p. 463.

Another to the North San Francisco Homestead Association, April 4, 1864.

Acts, p. 482.

Another to the South San Francisco Homestead Association, April 25, 1863.

Acts of 1863, p. 487.

All of which were sold at mere nominal prices.

After this review of Legislative action, it seems to us an infatuation for any one to dwell on Legislative "policy" as a reliance to evade the direct consequences resulting from the plain and unambiguous expression of the Legislative will.

L. B. Mizner

For Pl'ff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1866. No. 320.

O'NEAL, PLAINTIFF IN ERROR,

vs.

KIRKPATRICK, DEFENDANT IN ERROR.

Appeal from District Court for the District of California.

The act of 18th of May, 1861, *did* authorize the sale under which the plaintiff in this cause claims title. It is tide land, and the act expressly includes *all* tide lands.

It was not (that is the authority to sell was not) taken away by the act of May 14th, that was another law passed for another object, with different provisions. It declares that it shall have no application to lands within five miles of San Francisco; so far, therefore, as lands within that distance of the city are concerned, the law is in the same state as if the act of the 14th of May had never been passed. If that act (the last named) had not been passed, I think it perfectly undeniable that any lands coming within tide lands anywhere in the State would have been justly regarded as open to purchase from the State; therefore the plaintiff in error is entitled to a reversal.

J. S. BLACK,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE UNITED STATES.

WM. T. O'NEIL,
Plaintiff in Error,

vs.

JOHN KIRKPATRICK,
Defendant in Error.

Argument for the Plaintiff in Error.

C. T. BOTTS,
Of Counsel for Plaintiff in Error.

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1867.

IN THE

Supreme Court of the United States.

WILLIAM T. O'NEIL,
Plaintiff in Error,
vs.
JOHN KIRKPATRICK,
Defendant in Error.

Brief for Plaintiff in Error.

The plaintiff, in support of his allegation of error in the court below, submits two points to the consideration of this court.

1st. That the land in controversy was, under the laws of California, open to location and purchase, and that the certificate put in evidence by him vested in him a complete and indefeasible title to the premises.

2d. That even if the land for which this certificate was held was excepted from the general law opening up such lands to location and purchase, still, the defendant being an intruder, the certificate was conclusive evidence of title in the plaintiff.

If either of these propositions can be maintained, the judgment should be reversed.

In support of the first proposition the plaintiff contends, that by force of the 27th section of the act of the legislature of California (see Pamphlet of Laws, on file, p. 11,) the land in controversy became the subject of location,

purchase, and certificate. Up to the time of the issuance of this certificate this enactment remained in full force and effect, unrepealed and unaffected by any subsequent legislation.

On the other hand, it is contended by the defendant that the land in controversy being tide-land, within five miles of the city of San Francisco, and accruing to the state by virtue of her sovereignty, was not embraced in the 27th section of the act of the 13th of May, 1861; or, that if this land was included in that section, the general scope of the same was limited by the act of May 14, 1861, (Pamphlet, p. 31,) and again by force of sections 30 and 31 of the statute of the 27th April, 1863.—(Pamphlet, pp. 31–2.)

The act of May 13th, 1861, is entitled "An act to provide for the reclamation and segregation of swamp and overflowed, and salt-marsh and tide lands donated to the State of California by act of Congress."

The scope and object of this act is to provide for a new mode of survey and segregation of some of the state lands for the purpose of exposing them to entry and purchase, as provided in the act of April 18th, 1859, to which in terms the act refers.—(Page 11 of Pamphlet.)

Now, what description of lands is embraced in this act? In the first section of the bill they are described as "swamp and overflowed lands," but by an amendment, which appears in the shape of the 27th section, it is provided that *the provisions of this act shall apply equally to* ALL *salt, marsh or tide lands in this state, as to swamp and overflowed.*

We have only, then, to inquire whether the land purchased by the defendant was either swamp, or overflowed, or salt, or marsh, or tide land of the State of California. If it had been the professed object of the legislature to cover every piece of wet land in the state, they need have added nothing to this description. This particular piece of land the record shows (see page 8 of the Transcript)

to be below ordinary high water mark. This, if we mistake not, is both salt-marsh and tide land. But there is no question that these words "salt-marsh and tide lands" are used by the legislature to designate those lands over which the tide ebbs and flows, and which are supposed to accrue to the state by virtue of her sovereignty. Indeed, the counsel for the defendant refer us to another act in which these very words are used, and it is claimed that they are intended to designate the class of lands to which the land in controversy belongs, and we are triumphantly pointed to the proviso by which we were excluded from the operation of the general terms; without which proviso, it is admitted, we would have been embraced in the general terms of the act. Our opponents say, the act of the 14th May, 1861, and that of April 27th, 1863, when dealing with the subject of tide lands, to which category you belong, specially excludes you. We admit the fact, both that we are embraced in the general terms and excluded therefrom in the exception that is made against us. It is, therefore, settled by common consent that the land in controversy is covered by the designation of *tide* lands. We claim, then, that by the 27th section of the act of May 13th the land described in our certificate became subject to entry and purchase.

But, says the defendant, driven now to his last entrenchment, the general expression "all tide lands," in the 27th section, is limited and qualified by the words of the title to the act, which purports to be an act for the reclamation of those particular swamp and overflowed and marsh and tide lands that the state had acquired by donation. Now, when it is remembered that the state got no tide lands by donation, they all coming to her by virtue of her sovereignty, you will perceive that the court is invited to hold that a clear, unqualified, specific section of a bill is annulled and repealed by the title; an effect, we venture to say, that was never worked by a title before. The statement of this proposition, in all its nakedness, is suf-

ficient for its refutation. As to the effect upon a clear provision of a bill of an incongruous title, we would refer to the learned opinion of this court delivered by Mr. Justice Field in the case of Hadden et al. vs. Barney, at the present term of the court.

In addition to this, it is urged that a construction has been placed by the Supreme Court of California on this phraseology, which, whether right or wrong, must govern the Circuit Court of the United States; and we are referred to the case of "*The People vs. Morrill,*" (26 Cal. Rep., 336.) It is true that the court, in that case, did hold, and with good reason, that the general expression "lands accruing to the state by virtue of her sovereignty," used in the connection it is there used, and qualified as it is by other sections of the same act, should be construed to intend a particular portion or class, only, of such lands. But neither the decision nor the reasoning of the court exclude the land described in the plaintiff's certificate from the operation of the act of 1858. And as to the broader and clearer phraseology of the act of May 13th, 1861, the court expressly state that they decline to pass upon it.—(See 26 Cal. Rep., 357.)

And now we supposed we had disposed of all the objections to our claiming under the act of the 13th of May, 1861, as it stood at the date of its passage. But, forsooth, we hear of a new objection, started by Messrs. Blair & Dick, whose brief has just been served upon us. We are told, that if the bill referred to provides for the sale, as well as the reclamation, of the lands described, it is unconstitutional and void, under the 25th section of the constitution of the State of California.—The title expresses but one object, whilst the bill provides for two. The title first annuls a section of the bill, and then destroys the whole bill. Surely the title to this bill should stand proudly amongst its peers, for there is accorded to it a potency that was never ascribed to a title before. But the Supreme Court of California, whose

construction of the state constitution is authority for the Circuit Court of the United States, has disposed of this question.—See *Washington et al. vs. Page*, (4 Cal. Rep., 388.)

But, again, it is contended by the defendant in error that the 27th section of the act of May 13th, 1861, was repealed by the act of May 14th, 1861, (see Pamphlet, p. 31,) and again by force of sections 30 and 31 of the statute of the 27th of April, 1863.—(See Pamphlet, pp. 31–2.)

The Legislature of California had, prior to the 14th day of May, 1861, passed various acts opening up to location and purchase the swamp and overflowed lands of the state; and, in these acts, the term "Marsh and Tidelands" had been used in such a manner as to make it somewhat doubtful as to what lands were intended to be included in the act.—(See particularly act of April 21, 1858, p. 11 of Pamphlet.) Under these doubtful acts relating to swamp and overflowed lands, marsh and tide lands had been located and purchased. Now it was chiefly to confirm these sales of doubtful validity that the act of May 14th, 1861, was passed, and from the benefit of this confirmation, any then purchaser within the prescribed limits of San Francisco was undoubtedly excluded. If the act had contained no words except those relating to its main object, that of confirming certain sales already made, it will be admitted that it could have no effect upon the status of the plaintiff in this cause, who was not at that time a purchaser. Indeed, it is very clear that the act of May 14th could not have been intended to repeal or in any manner affect the act of May 13th, because the former was introduced into the Senate February 2d, 1861, whilst the bill approved May 13th, which originated in the Assembly, did not pass that body until the 9th day of April, and was passed by the Senate on the 1st day of May. But the act of the 14th, introduced, as we have said, in the Senate on the 2d day of February, was passed by that body on the 8th day of March. Then

the proposition of the defendant's counsel is reduced to this: that, by the passage on the 8th of March of the act of the 14th of May, the Senate intended to repeal the most important provision of a bill that passed that same body on the 1st of May. But even more than this: both bills were in the hands of the governor at the same time, and it was, probably, a mere accident which prevented the act to be repealed from bearing date posterior to the supposed act of repeal. The facts here alleged as to the dates connected with these two acts, may be verified by references to pp. 127 and 206 of the Senate Journal, and to pages 675 and 802 of the Journal of the Assembly of the Twelfth Session of the Legislature of California. The theory of the defence is, that the legislature, discovering on the 14th of May the egregious blunder that they had committed on the 13th, went to work to repeal the obnoxious 27th section, and resorted to this novel and peculiar method of effecting this object. We have shown, we think conclusively, that the legislative mind never contemplated any such result. Certainly the Senate did not, when, on May 1st, they passed the 27th clause of the act of May 13th, in the face of the alleged repealing act, which they had passed 54 days previously. Certainly the governor did not perceive any incongruity, when, having both bills before him, he signed them both.

But it is contended by the counsel for the defendant that although the legislature may not have intended such an effect, the one act, in its nature, works a repeal of the other. It is true that when two enactments relating to the same subject-matter are totally repugnant,—when they are so entirely contradictory that both by no possi bility can stand—the earlier must yield to the later expressed will of the legislative body. Now let us subject these two acts to the test of this rigid rule. The 27th section of the act of the 13th of May declares that the salt-marsh and tide lands, as well as the overflowed and swamp lands of the state (and under some one

of these heads it cannot be denied the *locus in quo* comes) may be located and purchased in the peculiar manner and mode prescribed in that act. Remember that other, and simpler, and less guarded methods of location for these lands had been prescribed by former acts. Now the act approved May 14th, in addition to confirming a certain class of sales of these lands, does go on to prescribe a future mode of acquisition, and from this particular mode the land claimed by the plaintiff is certainly excluded. This is the language to which we refer:

"And any of the said marsh and tide lands that remain unsold may be purchased under the provisions of the laws now in force providing for the sale of the swamp and overflowed lands of this state. * * * Provided, that marsh or tide lands located within five miles of the city of San Francisco, or of the city of Oakland, &c., shall be sold or purchased by authority of this act."

The general terms of this act, it will be observed, extend the operations of all the various acts then on the statute book in relation to swamp and overflowed lands to all the tide lands. The proviso excepts a special class of these tide lands from the sweeping operations of the act. The only effect is to declare that the tide lands in the neighborhood of San Francisco shall not stand upon exactly the same footing as the swamp and overflowed lands, and shall not be purchased in all the various modes and forms *then* prescribed for the purchase of swamp and overflowed lands. Remember that at the time this bill was introduced and passed, the peculiar mode prescribed in the act of May 13th was not in force, and consequently the mode therein provided for is entirely out of the purview of the act.

It is not upon a foundation such as this, we opine, that this court will find an indictment of blundering stupidity in passing two incompatible bills at the same session, and almost at the same moment, against the legislature of California. If it be urged that the act of the 13th was

signed one day before the act of the 14th, and was therefore in force when the latter took effect, and was consequently included in its provisions, we answer that this is to resort to a technicality invented for, and limited to, totally different purposes, and one that this court will not permit to be wrested to the invidious purposes for which it is proposed to use it.

But even if resort to this technical view of the case were allowed, and the act of the 13th were to be considered as in force at the time of the passage of the act of the 14th, we deny that we were thereby excluded from purchasing under the former act. The act of the 14th simply enlarges the mode of purchasing tide lands, that is to say, in addition to the specific provisions for the purchase of these lands, any of the modes by which swamp or overflowed lands might then be purchased may be resorted to for the purpose of securing the tide lands; and it is from this enlargement of the mode of purchase, and from this enlargement alone, that the land claimed by the plaintiff is excluded. But it is not under the enlarged mode, that is of the then existing modes of acquiring swamp and overflowed lands as contradistinguished from the specific mode of obtaining tide lands, that the plaintiff claims to have acquired title to the premises in controversy, and, therefore, he contends that his case is not included in the proviso.

So much for the repealing effect of the act of May 14th, 1861. But it is claimed that the legislature again repealed the 27th clause by the passage of the act, approved April 27, 1863. It is enough to say, that this act provides for the acquisition of "salt-marsh and tide lands" in a different mode and upon different and more favorable terms than did the act of the 13th of May, 1861, and that from these advantages and these more favorable terms the land claimed by the defendant is excluded, leaving such lands still subject to the harder provisions of the former act. It is true, that the act of

1863, repeals all acts and parts of acts in conflict with its own provisions. But an act which provides a particular mode and particular terms for the purchase of a whole class of lands, is not in conflict with an act which provides another mode and different terms for the acquisition of a portion of the same class. With respect to the lands purchasable under the act of 1863, it might possibly be held, that the new terms and conditions repealed the old, but as to the portion excluded from the operation of the act of 1863, there are no new terms or conditions, and, consequently, no repeal of the old terms by implication.

It is not very flattering to the intelligence of the legislature of California to suppose that for three sessions they were struggling to repeal the 27th section of the act of the 13th of May, and that during that whole time the simple mode of doing it *in totidem verbis* should never have occurred to them; but to effect this object, they couched their intention in language that confounded the officer specially chosen to construe these enactments, as well as the learned law officer of the state, and yet the existence of these extraordinary, improbable, and blighting facts, are necessary to the support of the defendant's theory.

Now, as to the second point, whatever may be the defects of the certificate held by the plaintiff, however available it might be to the state, or an individual in privity with her, to show that the land described in the certificate was within five miles of the city of San Francisco, and, therefore, not legally the subject of sale, the certificate being regular upon its face, the defendant, whom the record shows to be a mere intruder, a naked trespasser, can invoke no extrinsic evidence to show its invalidity. As to him, at least, it is conclusive evidence that the title of the state passed to the plaintiff.

In this connection we propose to examine, first, the nature and character of this certificate, and the statutory

effect of the same. We propose to show that, as far as the question in this case is involved, it possesses all the force and effect of a patent, and that when it is accompanied with the circumstances that are admitted in the record to exist, it commands the issuance of a patent as a mere ministerial duty on the part of the governor. The 7th section of the act entitled "An act to provide for the sale and reclamation of the swamp and overflowed lands of this state," approved April 21, 1858, is in these words (See pamphlet, p. 14):

"The certificate of purchase issued by the register, as aforesaid, or by the secretary of state, under the provisions of an act entitled "An act to provide for the sale of the swamp and overflowed lands belonging to this state, passed April twenty-eighth, one thousand eight hundred and fifty-five, shall be *prima facie* evidence of title, and all persons holding any such certificate, or certificates, of the register, shall present the same to the governor of this state; and, should the governor find that the land, or a part of the land, designated in said certificate, belongs or has been confirmed to the state, and the whole amount of purchase money, together with interest thereon, has been paid, he shall issue a patent for said land, or said part of said land, to and in favor of the original holder of the surrendered certificate, or to his legal representatives; or, in case such original certificate has been assigned, then to the last assignee of such certificate, or to his legal representative, and the title shall vest in such assignee or legal representative as effectually as if he had been the original purchaser; *Provided*, that neither the patent provided for in this section, nor the certificate provided for in the sixth section of this act, shall have any other legal effect or force than as a quit-claim of all right, title, and interest, on the part of the state."

So that we see not only is this certificate made *prima facie* evidence of title, but it is put upon the same foot-

ing with a patent, and, like it has the legal force and effect of a quit-claim of all right, title, and interest, on the part of the state. In this connection it is proper to observe, that this phrase, "quit-claim," is much in vogue in California, and has been adjudicated to operate as a conveyance without warranty.

In *Richter vs. Riley*, (22d Cal. Rep., 639,) the Supreme Court of California held expressly that these certificates were *prima facie* evidence of title, and as such admissible as evidence in an action of ejectment.

Having shown that this certificate is by statute invested with all the force and effect of a patent, we propose to see now how the courts have dealt with the attempt of an intruder to avail himself of the invalidity of a patent.

In *Parmelee et al. vs. Oswego and Syracuse R. R. Co.*, (7 Barb., 621,) the plaintiffs brought ejectment, relying simply upon a naked prior possession. The defendants showed a patent from the state, which it was argued by the plaintiffs was void. But upon this point the court said:

"The defendants have shown a title derived from the state by letters patent, executed by the proper authorities. Now, though this patent be void, the plaintiffs, who were mere strangers and intruders, cannot set up its want of validity. It was held in the case of *Cromelin vs. Mintur*, (9 Ala., 594,) that notwithstanding a patent was fraudulently obtained, or had issued in violation of law, and was therefore void, yet a mere intruder could not set up the invalidity of the patent. And this principle we believe to be sound law. The statute makes every security tainted with usury *absolutely void;* and yet no principle is better settled than that a stranger cannot set up this defence."

In *Cooper vs. Roberts*, (18 Howard, 176,) the plaintiff claimed under a patent from the State of Michigan, and upon it brought an action of ejectment against the defendant in possession, who was an intruder upon the property of the state. The defence relied upon the fact

that this land was not subject to sale and patent under the laws of Michigan. Upon this point this court said:

"The defendant further objects that the officers of the state violated the laws of Michigan in selling these lands after they were known, or might have been known, to contain minerals. Without a nice inquiry into these statutes to ascertain whether they reserve such lands from sale, or into the disputed fact whether they were known or might have been known to contain minerals, we are of the opinion that the defendant is not in a condition to raise the question on this issue. The officers of the State of Michigan, embracing the chief magistrate of the state, who have the charge and superintendence of this property, certify this sale to have been made pursuant to law, and have clothed the purchaser with the most solemn evidence of title. The defendant does not claim in privity with the State of Michigan, but holds an adverse right, and is a trespasser upon the land to which her title is attached.

"Michigan has not complained of the sale, and retains, so far as the case shows, the price paid for it. Under these circumstances, we must regard the patent as conclusive of the fact of a valid and regular sale on this issue."

Here reference is made to an important fact that the record shows existed in the case at bar. The State of California retains, so far as the case shows, the price paid for this land.

Now, suppose the state should file a bill to have this certificate delivered up as improvidently issued, does any one doubt that before she could obtain such relief from a court of equity she would be compelled to return the purchase money and pay for any improvements that the carelessness or error of her own selected agent may have caused her innocent grantee, who is in with at least color of title, to have erected on the premises? Surely, this stranger who usurps the prerogative of the state can be in no better condition than the state herself would be.

But in the case of *Doll* vs. *Meador* (16 Cal. Rep., 296,)

this whole subject was passed on by the Supreme Court of the State of California. The cases hereinbefore cited, together with that of *Bledsoe's Devisees* vs. *Wells*, (4 Bibb, 329,) and *Alexander* vs. *Greenup*, (1 Munf., 134,) to the same effect, were reviewed and approved by that court.

In the case of *Doll* vs. *Meador*, the plaintiff brought an action of ejectment based upon a patent from the state. The defence set up was that the land included in the patent was, under the laws of the state, reserved from sale, and was not, therefore, the legal subject of a patent. The court concludes its review of the law on the subject with these words:

"If the defendant were a mere intruder, not possessing any claim of title either from the general or state government, he would not be in a position to question the regularity and correctness of the action of the officers of the state in the selection of the lands, or the issuance of the patent. Until some one appears prepared to trace title to himself from a common or paramount source, parties who are clothed with the solemn evidence of title furnished by the patent of the state may rest in security, without fear of any successful disturbance in the enjoyment of the property held by them, whether that property be a portion of the school lands or swamp lands granted to the state by the general government."

This opinion was delivered by the then Chief Justice of the Supreme Court of California, who is now the Circuit Judge of the Ninth Circuit of the United States.

We, now, respectfully submit that we have demonstrated that the district judge who tried this case in the court below erred in finding, as a conclusion of law, that judgment should be entered for the defendant. Wherefore, we respectfully ask that the judgment rendered in this cause may be reversed, and that the court below may be ordered to enter a judgment for the plaintiff.

C. T. BOTTS,
Of Counsel for Plaintiff in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

WILLIAM T. O'NEAL,
Plaintiff in Error,

vs.

JOHN KIRKPATRICK,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The argument in behalf of the defendant in error, in this case, will be confined to two propositions, which, if convincingly established, must be decisive of the invalidity of the claim so boldly presented, and so ingeniously advocated, on the part of the plaintiff in error.

I.

The Act of the Legislature of the State of California, passed May 13th, 1861, did not authorize the Sale, to the Plaintiff, of the Land involved in this Action.

It is conceded that, prior to May 13th, 1861, no authority existed for the sale of lands of the description claimed by the plaintiff.

Brief for Plaintiff in Error, page 3.

But it is strenuously contended that, by the Act passed on that date, the requisite authority was given.

In order to determine the correctness or incorrectness of this position, it is necessary, before examining the provisions of the Act, to ascertain the essential facts shown by the record and bearing on the point under consideration.

The counsel for plaintiff is in error, and, by what we may term an inadvertent *suppresio veri*, suggests an erroneous inference, when he states it to be conceded that the land in controversy falls under the description of *tide lands.*

Brief for Plaintiff in Error, page 1.

The stipulation on which the case was heard in the Court below, shows *inter alia* (1) that the

land is within five miles of the City and County of San Francisco, that is, the City of San Francisco; (2) that it is below high water mark, and on the margin of the Bay of San Francisco; and (3) that it is tide land, but not necessarily tide land within the meaning of that term as used in the Act under examination, and that it is reclaimable, not for agricultural purposes, but for the business purposes of a great commercial metropolis.

The Acts of 1858 and 1859, confessedly did not authorize the sale of tide lands, as that term is understood by the plaintiff, at any point within the State of California, and it is not denied that those Acts superseded all former legislation upon the subject, and were designed to establish a complete system for the sale and reclamation of the swamp and overflowed lands of the State.

Statutes of California, 1858, *pages* 198–202.
Statutes of California, 1859, *pages* 341, 342.

The Act of May 13th, 1861, is entitled "An "Act to provide for the reclamation and segrega- "tion of swamp and overflowed, and salt marsh "and tide, lands, *donated to the State of California* "*by Act of Congress.*"

Statutes of California, 1861, *page* 355.

So far, then, as the intention of the Legislature can be ascertained from the title, to which, when

the true construction of a statute is doubtful, it is always proper to refer, the Act was not designed to affect any lands not granted by Congress—that is, not granted by what is commonly called "The Arkansas Act."

At this point a reason for the insertion of the words "salt marsh and tide lands," naturally suggests itself. The Act of Congress, of 1850, applied specifically to Arkansas, where the swamp and overflowed lands were covered with fresh water, but its provisions were extended to other States, including California, where there were large bodies of "salt marsh," not entirely beyond the reach of the tides, but still susceptible of reclamation and conversion to agricultural uses. How reasonable to argue that, in States belonging to the latter class, the Legislatures, in providing for the disposal of the swamp and overflowed lands, would employ terms sufficiently broad to cover every description of land that could be possibly included within the grant from Congress.

Such, undoubtedly, was the object of the Legislature of California, in the Act of May 13th, 1861, which was applied to the same subject, and substantially covered the same ground, as the Acts of 1858 and 1859, and this construction is supported, not only by the probabilities of the case and by the precise testimony of the title, but

by twenty-six sections of the Act in which the words "marsh and tide lands," or any words of similar meaning, do not once occur, and in which a complete system of segregation and reclamation is developed, not, as the counsel for the plaintiff intimates, applicable to the largest city upon the western coast of the United States, but in its very nature, and by evident intendment, restricted to lands comparatively valueless, but capable of being reclaimed for agricultural purposes. The Commissioners named in the Act, as shown upon its face, are all from agricultural counties, and the amounts to be paid and the quantity of land allowed to be taken by individual purchasers, in the absence of language expressly supporting his position, are wholly irreconcilable with the construction adopted in support of the plaintiff's speculative title.

Taking the title and the body of the Act into consideration, it is too evident for argument that when, in Section 27, it is provided that, "the "provisions of this Act shall apply equally to all "salt marsh, or tide lands, in this State as to "swamp and overflowed," the object is not to enlarge the scope of the statute, but, out of an abundance of caution, to prevent any salt marsh, or tide lands, which have been granted to the

State by Congress, from escaping from its operation.

Statutes of California, 1861, *pages* 355–61.

It will be observed that it is not claimed that the land in dispute was embraced within the grant from Congress, but it is expressly stipulated that it belongs to the State by reason of her sovereignty.

Brief for Plaintiff in Error, page 1.

The interpretation contended for is not unsupported by authority. The first section of the Act of 1858 enacts that swamp and overflowed lands shall be sold at the rate of one dollar per acre, "provided that, if upon the survey of such "lands, any portion thereof shall be found to be "lands belonging to the State by right of her "sovereignty, the moneys arising therefrom shall "be paid into the Treasury of the State as other "State revenues."

Statutes of California, 1858, *page* 198.

"This proviso," says the Supreme Court of California, "is to be read in the light of the sub-"ject matter. It is well known that that portion "of the swamp lands of the State, known as "'salt marsh,' is threaded by channels of greater "or less width, within the ebb and flow of the

"tide, which channels are of little or no use either "in the way of fishing or navigation. They are "but extensions of the 'mud flats,' and, like them, "belong to the State by right of its sovereignty. "While the principal purpose of the Act was to "sell the swamp and overflowed lands, which the "State held by grant, still it was considered that "that purpose could be best subserved by allow- "ing purchasers of salt marsh to include such "channels, when reasonably necessary, within "their surveys."

People vs. *Morrill*, 26 *California Reports*, *page* 355.

The counsel for plaintiff having expressly admitted, as already shown, that, prior to the passage of the Act of 1861, no authority existed for the sale of lands of the character described in the complaint, the above extract supplies a good and unanswerable reason for the insertion of the words "salt marsh" and "tide" lands in that Act.

But the learned counsel seeks to break the force of the opinion quoted by the assertion that it inferentially recognizes the construction of the Act of 1861 upon which he insists.

Brief for Plaintiff in Error, *page* 18.

The extract made in the last reference does

not justify the position it is cited to support, which is effectually answered in the language of the Court:

"*For all the purposes of the present discussion,* "*we shall assume* that the word 'tide' is used in "contradistinction to the word 'marsh,' etc."

People vs. *Morrill*, 26 *California Reports*, *page* 358.

As, under no possible construction, could it be held that the defendant in the case cited had any title under the Act of 1861, the Supreme Court, according to its habitual practice, refused to pass upon the question involved in this action.

Another and conclusive argument in support of our position as to the true interpretation of the Act of 1861, is to be found in contemporaneous legislation.

The Act of 1858 contains the following provision: "The swamp and overflowed lands "situated within the City and County of San "Francisco" * * * * * "shall be, and are "hereby, excluded from the provisions of this "Act."

Statutes of California, 1858, *page* 201.

It appears, therefore, that up to the passage of the Act of 1861, the valuable lands lying on the

water front, in the immediate neighborhood of San Francisco, could not have been the subject of purchase, and it has been shown that there was nothing in that Act to justify the sale of these lands. In order, however, to strengthen this point, we refer to a principle of law invoked by the counsel for plaintiff, and which, in his brief, is presented in the following sentence:

"Sometimes courts are aided by legislative "construction, and, where there is any doubt, "they lay great stress upon the view taken of it "by the Legislature, as evinced in *subsequent* "Acts."

Brief for Plaintiff in Error, page 9.

It has been seen that, by no legislation previous to that of 1861, could lands such as are claimed by the plaintiff be sold, and it is alleged that the Act of 1861, *ex vi termini*, does not strengthen his case.

The Act of 1861, as has already been frequently mentioned, was passed on the thirteenth of May. On the following day, an Act was passed, entitled "An Act to provide for the sale "of the marsh and tide lands of this State," which provided that all sales of marsh and tide lands belonging to the State, that had been previously made, in accordance with the provisions of any of the acts of the Legislature

providing for the sale of swamp and overflowed lands, should be ratified and confirmed, and that such lands might be sold under the laws then in force, "*provided, no marsh or tide lands located* "*within five miles of the City of San Francisco,*" * * * * * "*shall be sold or purchased by* "*authority of this Act.*"

Statutes of California, 1861, *page* 363.

Was the proviso quoted "pregnant with the "affirmation that the right" to sell land of the description claimed by the plaintiff, should "be "exercised under some other Act?"

Brief for Plaintiff in Error, page 13.

On the contrary, it was "pregnant with the "affirmation" that all previous sales of marsh and tide lands were invalid, and that, although such sales were to be ratified, to a limited extent, and although future sales of such lands might take place, under certain conditions, still neither the ratification, nor the authority to sell, should extend to marsh or tide lands within five miles of San Francisco.

There was no authority to sell the land in dispute before the Act of May 13th, 1861, and we earnestly claim that that Act is not of doubtful meaning, and confers no authority to justify the sale; and that, even if it were ambig-

uous in its terms, the ambiguity is removed by the decision referred to, and by the Act of May 14th, 1861, which is a clear and distinct legislative construction of the former statute.

II.

But, if any portion of the Act of May 13th, 1861, did authorize the sale to the plaintiff of the land described in the complaint, still that portion was repealed by the Acts of May 14th, 1861, and April 27th, 1863.

It has been proved, as we think, beyond doubt, that, neither prior to the passage of the Act of 1861, nor after the passage of that Act, was there any law of California under which a sale could be made of the land described in the complaint, or of any land, within the ebb and flow of the tide, not clearly capable of being reclaimed for agricultural purposes, or of any land within five miles of San Francisco.

But, assuming for the moment, that the first position in behalf of the defendant is incorrect, and that, by the Act of May 13th, 1861, an express authority was conferred for the sale of the land in controversy, still that authority was

annulled by the subsequent acts of May 14th, 1861, and April 27th, 1863.

The Act of May 14th, 1861, passed the day after the approval of the statute in which all the hopes of the plaintiff are centered, and, as it would seem, intended to correct some defect, or to neutralize some fraud, contained in that statute, is entitled, "An Act to *provide for the sale* of "the marsh and tide lands of the State." Its immediate object is to give power to sell those lands, and the fact of its passage is a legislative interpretation of the Act of the previous day, which is in harmony with the opinions we have expressed, and which it will be difficult, on investigation, to resist. Clearly, under the rule invoked by the counsel for the plaintiff, the two acts must be construed *in pari materia*, and whatever authority there was under them, at the date of the plaintiff's purchase, for the sale of tide lands, must be found in the later enactment, which, without prescribing any new mode of procedure, deals with the exact question, assumes that all former sales of tide lands were null and void, legalizes those sales, with some exceptions, distinctly provides that marsh and tide lands "may be purchased under the provisions of the "laws now in force," and expressly excepts from the operation of the authority thus granted, all

such lands "located within five miles of San "Francisco."

Statutes of California, 1861, *page* 363.

In other words, taking the construction of the first Act, presented by the counsel for plaintiff, as correct, the Legislature of California, on one day, declare that tide lands, within his very liberal definition of the term, may be sold, and the next day, in plain language, reaffirm this declaration, but say that they shall not be sold within five miles of San Francisco; and yet the counsel claims that the first Act is not to any extent repealed or affected by the last, and that the negative words contained in the later enactment are "pregnant with the affirmation" that the lands may be sold under the former statute.

The argument is ingenious, and, as a specimen of dialectical subtlety, may be regarded as interesting, but it is strikingly repugnant to common sense, and to the most elementary rules of statutory construction.

If I say to-day, "Tide lands shall be sold," and to-morrow, "Tide lands shall be sold, except in "San Francisco," does the implication arise that they may be sold in San Francisco, by virtue of yesterday's declaration?

The natural answer would be, that both declarations must be taken together, that the last is an affirmation of the first, with the simple exception that tide lands in San Francisco are excluded from its operation, and that my special object in making the second declaration was to create the exception in favor of San Francisco.

This is precisely what was intended by the Legislature of California, who, in this respect, merely followed the footsteps of their predecessors who passed the Act of 1858.

"The swamp and overflowed lands situated "within the City and County of San Francisco" * * * * * * "shall be, and are hereby, "excluded from the provisions of this Act."

Statutes of California, 1858, *page* 201.

The preceding argument directly applies to the Act of 1863, which in the first section, provides for the sale of all the swamp and overflowed, marsh and tide lands, in the State, in the thirtieth section, that the Act "shall not apply to the "marsh and tide lands upon the city front and "within five miles of the City and County of "San Francisco," and in the thirty-first section, that "all Acts, and parts of Acts, in conflict with "the provisions of this Act, are hereby repealed."

Statutes of California, 1863, *pages* 591-601.

"The latter Act," in the language of counsel for the plaintiff, "provides for the sale of *every* "*class of lands* belonging to the State." In other words, whatever the method of *procedure*, and it is unnecessary to complicate the argument by considering that question, the moment the Act of 1863 became law, the *authority* "for the sale of "every class of lands belonging to the State," was to be found in that statute, and, unless the plaintiff, whose certificate is dated February 23d, 1864, can bring himself within its provisions, he cannot recover in this action. But he cannot bring himself within its provisions, because the land he claims is within five miles of the City and County of San Francisco, and forms a part of its water front, and therefore for the sale of that land, no authority was granted by the Act.

The rules of construction applicable to the statutes under consideration are obvious, and there are almost innumerable cases in which they are enforced, to a very few of which we propose to refer.

"A subsequent statute, revising the whole sub-"ject matter of a former one, and evidently in-"intended as a substitute for it, *although it con-*"*tains no express words to that effect*, must, on the

"principles of law, as well as in reason and com-
"mon sense, operate to repeal the former."

Bartlet et al. vs. *King Ex'r*, 12 *Mass.* 545.
Giddings and Wife vs. *Cox*, 31 *Vt.* (2 *Shaw*) 609.

"We think that the statute of 1785, C. 24, upon
"which the *qui tam* action is founded, is repealed,
"if not by stat. 1800, C. 57, (which seems to have
"a different object in view) yet certainly by stat.
"1817, C. 191, *which appears to cover* the whole
"subject matter of the statute of 1785."

Nichols vs. *Squire*, 5 *Pick.* 168.

"Now, it may be conceded that repeals by im-
"plication are not favored by the courts, but a
"subsequent statute repugnant to a *prior one*,
"repeals it; and it is laid down in *Davis* vs. *Fair-*
"*banks* (3 *How. U. S. Rep.* 636) that if a subse-
"quent statute be *not* repugnant in all its provis-
"ions to a prior one, yet, if the latter statute was
"clearly intended to prescribe the only rule that
"should govern in the case provided for, it repeals
"the prior one."

Dexter and Limerick Plank Road Co. vs. *Allen*, 16 *Barb. S. C.* 18.

"When a statute is revised, or one act framed
"from another, *some parts being omitted*, the parts

"omitted are not to be revived by construction, "but are to be considered as annulled."

Pingree vs. *Snell*, 42 *Maine*, 55.

"Every statute must be considered according "to what appears to have been the intention of "the Legislature, *and even though two statutes "relating to the same subject be not in terms re- "pugnant or inconsistent*, if the later statute was "clearly intended to prescribe the only rule which "should govern in the case provided for, it will "be construed as repealing the original act."

City and County of Sacramento vs. *Bird*, 15 *Cal.* 296.

"The principle is, that when the Legislature "makes a revision of particular statutes, and "frames a general statute upon the subject mat- "ter, and from the framework of the Act it is "apparent that the Legislature designed a com- "plete scheme for this matter, *this is a legislative "declaration that whatever is embraced in the new "law shall prevail, and whatever is excluded is ig- "nored.*"

The State vs. *Conkling* 19 *Cal.* 512.

These rules of construction, which are purely elementary in their character, when applied to the statutes under review, fully sustain both of the

points on which the defendant rests this appeal, and lead inevitably to the following conclusions:

1. That the Act of May 13th, 1861 was designed merely to supplant the pre-existing system for the sale and reclamation of swamp and overflowed lands throughout the State, and neither expressly nor by implication authorized the sale of tide lands owned by the State by virtue of her sovereignty.

2. That, if the Act of May 13th, 1861 did authorize the sale of tide lands owned by the State as above stated, then, in so far as it affected lands of that description within five miles of San Francisco, it was repealed by the Act of May 14th, 1861.

3. That the Act of 1863 superseded all former legislation upon the subject of the disposal of the lands therein mentioned, and, from and after its date, furnished the only authority for the sale of those lands, and that, under that Act, no title could be acquired to the property in dispute in this action.

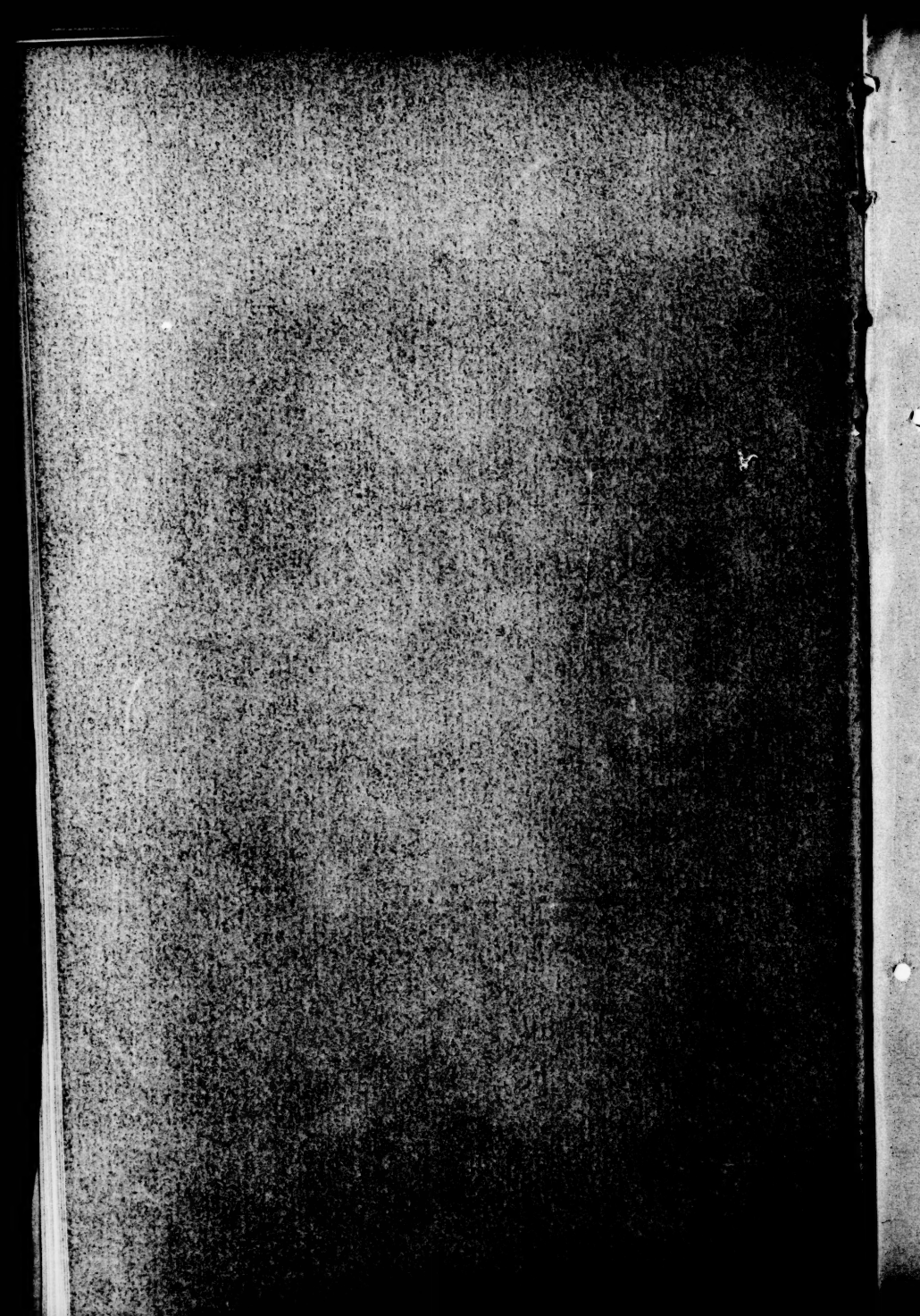
The record in this case discloses a bold, but so far unsuccessful, attempt to deprive the State of valuable interests for a nominal consideration, by an ingenious but strained and perverted con-

struction of statutory enactments, which, when read by the clear light of legal rules, are insusceptible of misinterpretation. It is to be hoped that, in the Supreme Court of the United States, as in the Court where the case was originally tried and determined, law and justice may be found happily to concur, and that no difficulty may be experienced in rendering a decision in favor of the defendant.

The judgment of the Court below should be affirmed with costs.

Dated, San Francisco, Nov. 28th, A.D. 1866.

DELOS LAKE,
Counsel for Defendant.



IN THE

Supreme Court of the U. S.

WILLIAM T. O'NEAL, *Plaintiff in Error,*

vs.

JOHN KIRKPATRICK, *Defendant in Error.*

M. BLAIR,
F. A. DICK,
Of Counsel.

Joseph L. Pearson, Printer, 511 9th street.

IN THE

Supreme Court of the United States.

WILLIAM T. O'NEAL,
Plaintiff in Error.
vs.
JOHN KIRKPATRICK,
Defendant in Error.

No. 220.

Brief of M. Blair and F. A. Dick, of Counsel for Defendant in Error.

This is a contest for a lot in the city of San Francisco, California, which depends upon the construction of the laws of that state relating to the sale of the *tide* lands of the state held in virtue of its sovereignty.

The controversy originates in an attempt to derive authority for the sale of the land in question, not from the class of laws passed with the object of providing for *the sale* of land, but by the construction of a section of an act belonging to another class of acts, having another and distinct object in view, viz., *the reclamation* of land. If the section relied upon was explicit, it would be in violation of the 25th section of the constitution of the state, which declares that "every law enacted by the legislature shall embrace but *one object, and that shall be expressed in the title;* and no law shall be revised, or amended, by reference to this title; but in such case the act revised, or section amended, shall be re-enacted and published at

length." And though such interpolations are not invalid in California as they are in some of the states, the intent ought to be unequivocal to be regarded.

I. *But the statutes relied on by the plaintiff, construed on his own principles, negative his title.*

The first of these acts was passed on the 28th April, 1855.—(Hittell's Laws, 4,058.) This was entitled "An act for the *sale* of swamp and overflowed lands belonging to this state." By the 18th section, it was declared that the act should apply only to the lands acquired by "the Arkansas act," and that it should not apply to "any lands belonging to this state, by virtue of its sovereignty, below the line of ordinary high tide-water, on the sea-shore and the shores of the harbors on the coast of this state."

The act required the county surveyors to survey such of the lands as purchasers wished to buy. These were to be recorded and forwarded to the surveyor general, who was to submit the plat and field-notes to the secretary of state. The purchaser was to pay $1 per acre to the county treasurer—credit was given and interest required. The county treasurer paid to the state treasurer, who certified the fact to the secretary of state, who issued a certificate to the purchaser, and the governor issued a patent on full payment; no person could enter more than 320 acres.

The 11th section provides that "no person shall become the purchaser from the state of any lands within ten miles of the city of San Francisco." The lands are also exempted from sale in the neighborhood of all other incorporated towns; no provision is made for *the reclamation* of the lands by this act, or even for setting apart the fund for that purpose.

The next act is dated the 21st April, 1858, and is entitled "An act to provide for *the sale and reclamation* of the swamp or overflowed lands of this state."

This act was amended in 1859, and as amended is spo-

ken of as the act of 1859, and the amendments are incorporated with the act as printed.—(Hittell's Laws, 4,081.)

The act of 1858 repeals the act of 1855. The first section declares that the lands shall be sold for $1 per acre, and that the proceeds under this and the previous act shall be set apart as a fund for "the reclamation of said lands as the legislature may *hereafter* direct; provided that if, upon the survey of such lands, any portion thereof shall be found to be lands belonging to the state by right of her sovereignty, the moneys arising therefrom shall be paid into the treasury of the state as other state revenues."

This is the only authority contained in this act or in the amendatory act of April 18, 1859, authorizing the sale of land acquired in virtue of the state sovereignty, and the Supreme Court of California, in the case of the People vs. Morrill, (26 Cal. Reports,) it is admitted by plaintiffs' counsel, so construe this provision as to preclude the sale of the lot here in controversy under it. The second section of the act of 1858 as amended, authorized the sale of 640 acres to one person.

The duty of issuing the certificate of title upon which the governor issued a patent was turned over to the register of the state land office.

The eleventh section of the act of 1855, exempting from sale the lands in the vicinity of San Francisco and other towns, was modified as to San Francisco, so as to exempt within five miles of the city.

The next act, dated 13th May, 1861, is the act under which the plaintiff claims. It is entitled "An act to provide for the *reclamation* and *segregation* of swamp and overflowed and salt marsh and tide lands donated to the State of California by act of Congress."

Unless the scope of this act is enlarged, as claimed by the plaintiff, by the 26th section, into an act for *the sale* of land; it is strictly what its title imports,—an act to provide for the *segregation* and *reclamation* of lands. To effect this object the act establishes a board of

commissioners to take charge of the work of reclamation, prescribes all the details of their proceedings, and appropriates the swamp land fund to enable them to carry out the work. The board is to employ engineers to devise the plan of operations, and, that being settled, they are to contract for the work, and when that is done, they are to adjust the accounts, pay for it, &c.

The surveyors are to set apart or segregate the land to which the act is applicable. The only section supposed to bear on *the sale of these lands* is the 26th, which provides that—

"After the survey by sections, and the segregation contemplated by this act has been made, any person desirous of purchasing swamp and overflowed lands shall file an affidavit in the office of the county surveyor of the county in which the land is situate, that he has not purchased any other land under the provisions of any act to provide for the sale of swamp and overflowed lands belonging to this state, which, with the lands sought to be purchased, shall exceed six hundred and forty acres; that he has no knowledge of any other legal or equitable claim than his own to the tract of land desired to be purchased by him. It shall be the duty of the county surveyor to make out a plat and field notes for each applicant from the map on file in his office, and forward a certified copy of the same to the surveyor general, in accordance with an act to provide for the sale of swamp and overflowed lands of this state, approved April 18th, A. D. 1859."

The plaintiff's counsel says of this, at p. 7 of the brief, "If we subject that section to analysis we find that it contains, 1st. 'An invitation to purchasers to come forward, and an offer by the state to sell to them.' 2d. 'The form of an affidavit to verify that the applicant belongs to the class who are permitted to purchase.' 3d. Direction to the county surveyor to make out a plat or field notes for the applicant.' 4th. 'Directions to the same officer to forward a certified copy of the same to the surveyor general, in accordance with the act of 1859.'"

He then insists "That in this act of May 13, 1861, the

legislature engrafted 'tide lands' upon what was the first object of the bill, to wit: 'swamp and overflowed lands,' and then, for the remainder of the proceedings, to effect purchases, left the applicants for either class to the provisions of the acts 1858 and 1859, and this seems to be distinctly pointed out by the closing words of section 26.

"We therefore urge that the two acts are strictly cognate, that the fact of engrafting the provision for selling 'tide lands' upon the latter does not alter its character in this respect, so as to tear it away from the system of acts to which it belongs, and that the two are to be construed *in pari materia* as parts of one general plan. * * * *

"Following this rule, the applicant to purchase will take up the act of 1859, and beginning at the point of action where the act of 1861 leaves off, and which commences with section 4 of the act of 1859, will find abundant provisions for the attainment of his end." (See act of 1859 incorporated with act of 1858, 1 Hittell, § 4081.)

In support of this proposition he cites from Dwarris that, "It is an established rule of law that all acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view."

Also, Lord Mansfield, in Rex v. Loxdale, that "when there are different statutes *in pari materia* tho' made at different times, or even expired and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other."

Also, Lord Hardwick, that a statute continued with additional clauses "must be construed as if the former had been therein recited."

The result claimed from this reasoning is that the act of 13 May, 1861, authorized the sale of *tide* land equally with the swamp and overflowed lands, and "then for the remainder of the proceedings to effect purchases, left the applicants for *either* class to the provisions of the

acts of 1858 and 1859;" that "tide lands" are put on the footing of the "swamp and overflowed lands," so that whenever swamp or overflowed lands could be sold the *tide* lands could also be sold, and for the same price, and *vice versa*. "The legislature," says the plaintiff, "engrafted tide lands upon what was the first object of the bill, to wit: 'Swamp and overflowed lands.'" In a word, he would have the words "tide lands" added to the words "swamp and overflowed lands" wherever they occur in the act of May 13, 1861, and the cognate acts of 1858 and 1859.

But as the 13th section of the act of 1858–9 provides that "The swamp and overflowed lands situated within the city and county of San Francisco * * * * are hereby excluded from the provisions of this act," and his reasoning requires the insertion of the words "tide lands," in this, as in other sections of the act, he is not entitled to recover the lot in his own reasoning. His case requires the words "tide lands" to be inserted in all the other sections of the "cognate acts" of 1858–9, but excluded from the 13th section, although the language of the 27th section of the act of 13 May, 1861, upon which he relies, says expressly, "that the provisions of this act shall apply *equally* to all salt marsh or tide lands in this state *as to swamp and overflowed;*" in other words, that it shall have the same application to "tide lands" as to "swamp overflowed lands."

But how can we give the same application of the "cognate acts" invoked by the plaintiff to the tide lands as to the swamp and overflowed lands, without inserting the words "tide lands" throughout these acts, wherever the words "swamp and overflowed lands" occur.

The plaintiff's counsel next attempts to show a legislative construction of the act of May 13, 1861, in accordance with his views. He says: "The succeeding legislature, in less than a year from the passage of the act of May 13, 1861, passed an act supplementary to that act.—

(See Hittell, sec. 4,143.)" This supplementary act provides that "the money therein, or thereafter received, in the swamp-land fund as having been paid by purchasers of land within the district thus certified, less the amount expended in the survey, shall be set apart by the comptroller and treasurer of state from the swamp-land fund to the credit of such district, to be applied in the reclamation of said district, as is provided in the act to which this is supplemental: *Provided*, That in no case shall more than one dollar for each acre of the swamp, TIDE, or marsh land in such district be thus set apart, excepting that where more than one dollar is paid, the whole sum so paid shall be thus set apart," &c.

He also cites the act of April 4, 1864, (Hittell, sec. 4,180,) which provides that "upon the segregation of a swamp land district by the board of swamp land commissioners, under the provisions of an act entitled 'An act to provide for the reclamation and segregation of swamp and overflowed and salt marsh, and tide lands donated to the State of California by act of Congress,' approved May 13, 1861, and under the provisions of the several acts supplemental and amendatory thereto, and upon the certificate of the said board of commissioners, as required in said acts, being filed with the comptroller and treasurer, the total amount of money in the swamp land fund belonging to a district, thus certified, is hereby set apart and appropriated to be expended in the reclamation of said district."

He also cites the act of 10th April, 1862, (Hittell, sec. 4,134,) 31st March, 1863, (Hittell, sec. 4,158,) and the act of April 27, 1863, (Hittell, sec. 4160.) He says of the first passage above quoted: "Here is legislation in a supplemental act providing a disposition for the funds arising from the sales already made and to be made under the original act." And of the others: "All these acts go to show that after the passage of the act of May 13, 1861, and the surveys made under its authority, it be-

came the common habit of the 'officers of the government to sell and recognize sales under this act, from which sales accrued money and securities paid into the swamp land fund, which money and securities were disposed of and dealt with by the legislature, with a full knowledge of the sources from which they arose.'"

The acts of April 10, 1862, March 31, 1863, and April 27, 1863, cited in this connection by the plaintiff's counsel, have no bearing on the point he argues, for they neither refer to the act of May 13, 1861, in terms, or to any provisions of that act. The two first are acts for the remission of interest, a subject not spoken of in that act at all, and though the last provides for the reclamation of lands on the petition of the holders of certificates of purchase of marsh and tide lands, its obvious relation is to the act of 14th May, 1861, which provides specifically for the sale of such lands.

The acts above quoted, which refer in terms to the act of 13th May, 1861, like the original act, deal altogether with the object specified in the title of the act, viz: the reclamation of the lands; and the passages quoted merely turn over to the commissioners charged with the reclamation, the fund received by another set of officers charged with selling the lands under laws passed for *that object*, specifying what lands are to be sold, what are to be reserved, the prices to be paid, the credits and receipts to be given, the conveyances to be executed, &c., &c.

It is therefore not correct to assert, as the plaintiff's counsel does, that these supplemental acts show the disposition of the fund arising *from sales made under the act of May* 13, 1861. It is true, however, that the passages quoted by plaintiff's counsel, and reproduced above, in dealing with the subject indicated in their titles, describe the "swamp land fund" to be applied in each district, as consisting of the proceeds of the sale of "the swamp, tide, and marsh lands" in that district.

But this does not designate "the swamp, tide, and

marsh lands" which were subject to be sold, or by any means imply as the argument assumes that *all* of those lands were subject to sale. It could as well be assumed, from the act to distribute the proceeds of the public lands that all such lands were subject to sale at its date, and that every entry made was legal, without showing it to be in accordance with the laws which provide specifically for the sale of the public lands.

TRUE CONSTRUCTION OF THE ACT OF 13TH MAY, 1861.

II. The 26th section of the act of May 13th, 1861, prescribes the affidavit to be required of persons desirous of purchasing the lands to which the act applies, and directs the county surveyor to follow the act of 1859, providing for the sale of swampand overflowed land, in furnishing the plats and field notes of the tracts applied for.

That this is the whole effect of the provision, is not controverted, and it is admitted that the section, as it stands, is inoperative as a provision to sell lands. To make it operative requires the addition of provisions of much greater importance than any it contains, as that the treasurer should sell and receive the money, that he should take one dollar an acre for tracts of land worth, as this record shows, $40,000 per acre, that the register of the land office should give a certificate to the purchaser, and the governor issue a patent, &c., &c.

The ingenuity which now attempts to supply these deficiencies, even whilst stimulated by so vast a prize, was tasked for three years to discover the process.—(See Houghton's Report, appended to Statutes, printed in this case by the plaintiff.) But, after all, it consists only in saying that, as this section, on which this claim is founded, is "afflicted with inherent inefficiency, and want of purpose," and is, in fact, a nullity in inself, it must be helped out by some other law, if one exists which can be brought to the rescue, for it will never do to let the sec-

tion go for nothing. The acts of 1858–9 are thus pressed into service, or so much of them as suits the purpose, disregarding the 13th section, which forbids the sale of all classes of lands it operates upon in San Francisco.

The rule requiring public grants to be construed strictly, applies with equal force to any law under which public property is claimed. The Supreme Court of California have applied this principle to defeat a claim for tide land, upon no remote implications or patchwork of statutes, with fatal exceptions left out, but based upon the express words of the statute it itself. The proviso to the 1st section of the act of 1858 expressly authorized the sale of tide lands. But as that was not the object of the act, the court felt it was not designed by the legislature in this incidental way to subject these lands to sale, although the language used was broad enough to carry any *surveyed tide* lands.

Comparing this proviso with the incongruous section of the act of May 13th, 1861, where there is not a syllable to authorize the sale of any land whatever, and it will be easily understood why the state court was not troubled with this case.

The incompleteness of the 26th section of the act of May 13th is as easily accounted for as its "inherent inefficiency" is readily relieved by turning to the act of the next day. These acts were pending together, and are probably the work of the same committee, if not the same member, and were intended to be, in fact, what they are in legal contemplation, one law, being passed at the same session.

III. *But there were two other acts in force when this lot was sold, expressly prohibiting the sale of it.*

The declared object of one of those acts by its title was to regulate the sales of the class of lands to which this lot belonged, and both cover the whole subject, and expressly forbid the sale. The first was entitled "An

act to provide *for the sale* of *the* marsh and tide lands of this state," and was approved 14th May, 1861, the very next day after the approval of the act "to provide for the *reclamation and segregation* of swamp and overflowed and salt and marsh lands donated to the State of California by act of Congress," upon which the plaintiff relies for title. The act of 14th May, 1861, is in these terms:

"SECTION 1. The sales of all marsh and tide lands belonging to this state, that have been made in accordance with the provisions of any of the acts of the legislature, providing for the sale of the swamp and overflowed lands belonging to this state, are hereby ratified and confirmed; and any of said marsh and tide lands that remain unsold may be purchased *under the provisions of the laws now in force providing for the sale of the swamp and overflowed lands of this state;* and all moneys derived from the sale of such lands shall be paid into the state swamp-land fund, to be used for the reclamation of the swamp and overflowed lands: *Provided*, No marsh or tide lands, located within five miles of the city of San Francisco, or of the city of Oakland, or within one mile and one-half of the state prison grounds at Point San Quentine, shall be sold or purchased by authority of this act: *And provided further*, That no sales of lands, either tide or marsh, excepting alcalde grants, which are hereby ratified and confirmed, within five miles of said cities, or within one mile and one-half of the state prison grounds aforesaid, shall be confirmed by this act.

"SEC. 2. This act shall take effect from and after its passage."

This act effectually interdicts the sale of this lot. Assuming what has been expressly decided since by the Supreme Court of California, in the case above cited, that the sales of tide lands made prior thereto were void, it proceeds to sanction such sales and such sales only as have been, or may hereafter be, made, in accordance with "*the provisions of the laws now in force providing for the sale of the swamp and overflowed lands of this state*," and all these laws, as we have seen, expressly except from sale the lot in question here.

But the plaintiff in some unexplained way hopes to elude this exception even whilst insisting that the act of May 13, itself comprises "the laws in force" here described, which contain it.

But the act of the 14th cuts him off in still another way. His purchase was made after that act, when no purchase was valid not therein allowed. The language is, that "any of said marsh and tide lands that remain unsold *may be purchased* under the provisions of the laws now in force providing for the sale of the swamp and overflowed lands of this state."

It was therefore only in accordance with such law that the lands could be purchased. The previous sales under these laws were legalized and these laws were continued in force to regulate future sales, and the sole purpose of the act was to adapt and apply these laws. To make his purchase valid the plaintiff is obliged to claim that the act of the 13th, under which he claims, is comprised in the description "of laws in force" here given for the exclusive regulation of the sales of these lands and which are embraced in, made a part of, and continued by this act of the 14th, and which "must be construed" says Lord Hardwick, "as if they had been recited therein." Being thus parts of this act, the proviso limiting the operation "of *this* act," apply to these clauses thus recited in it. Indeed the proviso would have nothing to operate upon unless upon these clauses.

The ingenious quibble of the plaintiff's counsel, alleging that the proviso declaring that the tide lands, which included the lot in question, shall not be sold or purchased by authority of this act, contains "a negative most pregnant with the affirmation that the right was to be exercised under some other act," is thus met and disposed of by his own claim that the act under which he sets up title was one of the laws which was incorporated in this act, and therefore limited by the proviso.

Moreover, this act purports in its title and contents to

cover the whole ground—curing the irregularities in previous sales, prescribing the mode of sale in future, forbidding sales thereafter within five miles of San Francisco, Oakland, &c., and disaffirming any sales previously made within these limits, excepting only alcalde grants.

The act of 27th April, 1863, entitled "An act to provide for the sale of certain lands belonging to this state," it is admitted by the plaintiff's counsel, is of this character, for he says it provides for the sale of every class of lands belonging to the state. This act forbids the sale of the lot, and no proposition is better settled than that such acts supersede all other acts relating to the subject.—(See authorities cited in Judge Lake's Brief.)

M. BLAIR,
F. A. DICK,
For Defendants in Error.

IN THE

Supreme Court of the United States.

WILLIAM T. O'NEAL, Plaintiff in Error,

vs.

JOHN KIRKPATRICK, Defendant in Error.

The briefs in this case filed by the respective parties refer to several statutes of the State of California, and as only one copy of said laws is in the library, they are printed for the use of the court.

I.

An Act to provide for the reclamation and segregation of swamp and overflowed, and salt marsh and tide, lands, donated to the State of California by act of Congress.

[Approved May 13, 1861, 355.]

SECTION 1. E. H. Allen, of San Joaquin, B. B. Redding, of Sacramento, Phillip E. Dresher, of Sutter County, M. M. Richardson, of Solana County, and John Hoagland, are hereby appointed a board of commissioners for the reclamation of swamp and overflowed lands belonging to this State. Said commissioners shall hold their office for the term of one year, and until their successors shall be elected by the senate and assembly in convention. The commissioners to be elected by the senate and assembly in convention shall hold

their office for two years, and until their successors are elected and qualified. In case any of the commissioners named in this act fail to qualify, or if a vacancy occur from death, resignation, or otherwise, the governor shall appoint some one to fill the vacancy. [*Amendment, approved April* 25, 1863, 523.

SEC. 2. The board of commissioners shall, within thirty days after the passage of this act, take the usual oath of office, and elect one of their number as president, and another as secretary, who shall receive no additional compensation as such president and secretary, other than the compensation allowed to them under this act.

SEC. 3. Said board of commissioners, a majority of whom shall constitute a quorum, shall hold monthly meetings at the capital of the State, for the reception of petitions and the transaction of business. They may adjourn from day to day, but no adjournment shall be for a longer period than one month. They shall keep a full and complete record of all their transactions as a board, and they shall transmit to the governor, to be by him presented to the legislature, an annual statement, in detail, showing the location and quantity of land reclaimed, its cost per acre, the location and quantity, in acres, in progress of reclamation, under contract, the location and quantity of lands for the reclamation of which petitions have been received, together with such other statistical information, suggestions, and recommendations, connected with the purposes of the commission, as they may deem proper.

SEC. 4. Whenever a petition shall be received by the board of commissioners, from the holders of patents, or certificates of purchase of swamp lands, on a tract of swamp and overflowed land susceptible of one mode, or system, of reclamation, which petition shall represent one-third, in acres, of said tract of land, asking for the drainage and reclamation of said land, it shall be the duty of the board of commissioners to appoint an engineer, whose duty it shall be to make an examination and survey of said tract of land. The engineer shall, with the plat of such examination and survey,

return an exhibit, showing the levels of the country surveyed, the average depth of water in winter and in summer, the sources from whence the water flows in to cover the land, the height and width of embankments necessary to prevent overflow, the depth and width of sloughs to be filled, the streams to be diverted, and specify, in detail, the work necessary to be performed for the reclamation of the tract of country, for the reclamation of which the petition was received; also, an estimate of the total cost of the work.

SEC. 5. It shall be the duty of the engineer so appointed to aid and assist in making plans and specifications for the reclamation of said lands, and give general directions for its reclamation, subject to the orders and control of the board of commissioners.

SEC. 6. The board of commissioners shall have power to remove the engineers, and appoint their successors, at will.

SEC. 7. Upon the adoption of a plan and specifications for the construction of the work, the board of commissioners shall cause a duplicate to be placed on file in the county clerk's office of one of the counties in which the said district is situate, and give notice by publication in a newspaper published in the county, for the period of thirty days, if a newspaper be published in the county, and if none be published therein, then in a newspaper published in an adjoining county, that the plans and specifications can be seen at the county clerk's office, and that the board of commissioners are prepared to receive sealed proposals for the construction of such work in accordance with the plans and specifications, and that the same will be let to the lowest responsible bidder, stating the time and place said proposals will be received and opened; the time shall be at least thirty days from the first publication of said notice. [*Amendment, approved April* 25, 1863, 523.

SEC. 8. All contracts let under the provisions of this act shall be let in sections corresponding in length with the frontage of each owner's land, and the commissioners shall award said contracts to the lowest responsible bidder, but shall have power to reject any and all bids, if deemed too

high, and advertise again for proposals; provided, that should there be two or more bids of equal amount, the contract shall be let to the owner of the land on which said levee is to be built; and provided that said owner is one of the bidders. Any person or persons to whom a contract may be awarded shall enter into a bond, with good and sufficient sureties, to be approved by the board of commissioners, payable to the State of California, for the use of said swamp-land district, for double the amount of the contract price, conditioned for the faithful performance of said contract. [*Amendment, approved April* 25, 1863, 523.

SEC. 9. Whenever it shall be found necessary to use any levee, or embankment, or other means of reclamation, which has been constructed by any person owning lands, the said levee, embankment, or other work, shall be measured, estimated, and paid for, to said owners, at the contract price, and the sum so paid shall be deducted from the amount to be paid the contractor.

SEC. 10. When any given portion of the work under contract has been completed, and such portion has been approved by the engineer and by the board as being in accordance with the terms of the contract, the board may by vote approve the account of said completed portion of the work, and certify said account for fifty per cent. of the amount to the State board of examiners, and on the approval of the board of examiners, the controller shall draw his warrant on the treasurer, payable out of the fund of the district, for the said fifty per cent. of the amount of the account so approved. When the whole work has been completed in accordance with the terms of the contract, the board shall certify that the whole work has been performed in accordance with the terms of the contract, whereupon the controller shall draw his warrant on the district fund in favor of the contractor for the remaining balance on the account then due. The warrants drawn by the controller on the fund of a district shall be payable out of any money in the State treasury belonging to the fund of said district, or it shall be received by the tax-collector in payment of the tax authorized to be

levied for the construction of levees and other work of reclamation in said district, or it shall be received by county treasurers in payment for the interest due on swamp lands within the district, or in payment of the purchase of swamp lands within the district; provided, always, that a warrant drawn on the fund of the district shall not be received in payment for the tax, interest, or purchase-money due on lands in any other district. [*Amendment, approved April* 25, 1863, 523.

SEC. 11. No contract shall be considered as complete until after it has been approved by the engineer, and the work shall not be accepted by the board, if objections be made thereto, until after an examination and report of a committee of not less than two members. [*Amendment, approved April* 25, 1863, 523.

SEC. 12. The commissioners mentioned in this act shall each receive a compensation of seventy-five dollars per month, and the commissioner who shall be elected secretary shall receive an additional compensation of twenty-five dollars per month for his services as such secretary, payable from the swamp-land fund. The civil engineers, to be selected by the board, shall receive as compensation for their services in surveying, measuring, leveling, and making estimates, a reasonable sum, to be allowed by the board of commissioners, which in no case shall exceed six dollars per day for the time actually employed; and the board may also allow a reasonable compensation to such assistants as they may require; provided, that in no case shall it exceed four dollars per day, and the sum so paid the engineers and their assistants shall be a part of the charges in the estimates of total cost of the reclamation of the particular district of land surveyed. [*Amendment, approved April* 25, 1863, 523.

SEC. 13. The copies of all surveys, field-notes, plats, plans, specifications, profiles, charts, and all other papers, made and executed by the engineer, in the discharge of his duties under the provisions of this act, shall be the property of the State. All the articles mentioned in this section shall be delivered by the engineer, so soon as such surveys, field-notes, plats, plans, specifications, profiles, charts, and all other

papers be completed, to the secretary of the board of commissioners, as the property of the State, for the use of the board of commissioners, until the expiration of their term of office, when the said articles, together with all the books, papers, contracts, and all other documents pertaining to the objects of the commission, shall be delivered to their successors in office.

SEC. 14. The books, papers, contracts, agreements, and all documents, pertaining to the commission, shall be always open to the inspection of the State board of examiners and to committees from either branch of the legislature.

SEC. 15. After a petition has been received by the board of commissioners for the survey and reclamation of a particular tract of land deemed susceptible of one mode of reclamation, and the survey of said tract of land has been ordered, and upon the return of said survey, accompanied by the estimates, it is found that the said tract of land cannot be reclaimed, except at a cost that will exceed one dollar per acre, in the aggregate, and such sum as may have been subscribed and paid in cash by individuals, for the whole tract sought to be reclaimed, the cost of such survey paid to the engineer shall be a charge against the particular tract of land so surveyed, to be computed in any future estimate for the reclamation of said tract of land.

SEC. 16. If in the work of reclamation it be found necessary to construct levees, excavate trenches, or perform other work, on lands other than swamp and overflowed lands, the board of commissioners shall have power to enter upon, and take possession of, so much of said land as may be necessary for said work of reclamation. If the same be private and individual property, and the rights and privileges necessary be not granted by the owners, the board of commissioners shall petition the district court of the district in which said land is situated, to appoint three appraisers, to assess the damages arising from the taking of such land, and the district court shall thereupon appoint three disinterested persons, who shall have full power to proceed to such premises, and to examine, hear, and determine, all questions of damages and

injuries to such land, arising from such taking; and to award the amount of the same to the person, or persons, entitled thereto, and for this purpose said appraisers shall have power to administer oaths. The appraisers shall make their report to the court, and the same shall be approved, or set aside, for cause shown, and if set aside, other appraisers shall be appointed, who shall proceed in like manner; and as soon as such award shall be affirmed, it shall have the effect of a judgment. The award thus found shall be allowed by the board of commissioners, and shall be paid in like manner as for work under contract, and the amount thus awarded shall be computed in the total cost of reclamation, as a portion of the charges against the tract of land to be reclaimed; provided, that no damages shall be allowed for the use of, or for the taking of, lands, where said lands have been purchased from the State, under the several acts providing for the disposal of the swamp and overflowed lands.

SEC. 17. The commissioners appointed, or who shall be elected, under the provisions of this act, shall each severally, before they shall qualify and enter upon the duties of their office, file with the secretary of State a bond, to be approved by the governor, in the penal sum of ten thousand dollars, conditioned for the faithful performance of their duties as commissieners.

SEC. 18. No commissioner shall be concerned, or interested, either directly or indirectly, as principal, partner, or agent, in any contract to be awarded by the board, or the profits to be derived therefrom; and any commissioner convicted of violating the provisions of this section shall be deemed guilty of felony, and such conviction shall work a forfeiture of his office, and he shall be punished by imprisonment in the State prison for a period not less than one year nor more than five years.

SEC. 19. The county surveyors of the several counties of this State shall, immediately after the organization of the board of commissioners, proceed to segregate the swamp and overflowed lands within their repective counties from the high lands in said counties, and make complete maps of all

the swamp and overflowed lands within their respective counties, in legal subdivisions of sections and parts of sections, together with a tabular statement of all such lands as have been sold by the State, and under what act the same were sold, of all lands claimed and by whom claimed, and as nearly as possible by what title the same are held, and file the said tabular statement in the county recorder's office of their respective counties; also, transmit duplicates of said maps to the surveyor general of the State; provided, however, that it shall be discretionary with the board of commissioners whether land already surveyed and segregated under any former act for the sale and reclamation of swamp and overflowed lands shall be resegregated or surveyed under this act; and provided, further, that they shall determine whether the segregation may be made by a complete survey of all such swamp and overflowed lands into sections, or by running the line of division between the swamp and United States land, and make said maps from said survey. It shall further be the duty of the county surveyors to procure such testimony, to be taken before a notary public, or any officer authorized by law to administer oaths, as they shall be able to procure, that all of such lands that are embraced within the said survey and exhibited on the map, are swamp and overflowed lands; and in all cases where any of the said lands have been returned as United States lands, whether sold, or unsold, they shall state that fact, and procure all the evidence that they may deem sufficient to substantiate the fact that such lands are swamp and overflowed lands, and transmit the same to the surveyor general of the State. As soon as practicable after the passage of this act, the board of commissioners shall send a copy thereof, with instructions thereupon, to the county surveyors of all the counties in the State, with blank affidavits in the form required by the commissioner of the general land office at Washington.

SEC. 20. One copy of the survey and map herein required to be made, shall be retained by the county surveyor, and shall be the property of the county; another copy, accompanied by affidavits as in this act required, covering the

whole tract of swamp and overflowed land, exhibited as such on his map, and numbered with a corresponding number entered on the tract of land exhibited on the map to which it refers, shall be filed with the surveyor-general, as hereinafter required, and the county surveyor shall at the same time report to the surveyor-general a general description of the land returned and mapped as swamp and overflowed, showing the cause of the overflow of the land, and a general description of the sloughs or creeks through which the waters enter into the low lands.

SEC. 21. The surveyor-general shall compile a general map of the State, in duplicate, showing all the swamp and overflowed lands of the State, which shall have been returned by the county surveyors as the property of the State, together with the county boundary-lines where crossing the same. He shall also enter thereon the number corresponding with the affidavits; he shall also compile, from the testimony received and on file in his office, a general schedule of the swamp lands in the State by their description; he shall also distinguish on said map the lands already sold by the State as swamp and overflowed; he shall also prepare a report, showing any cases in which the swamp lands have been infringed upon by the United States government surveys.

SEC. 22. One of the copies of the general map to be compiled and made by the surveyor general, with the schedule of the swamp and overflowed lands so claimed, and the affidavits required by this act, shall be by him transmitted to the governor, and by the governor forwarded to the proper department of the general government at Washington, as an exhibit of the lands which the State claims under the act of congress of September twenty-eight, eighteen hundred and fifty, and request the department to certify said land to the State of California.

SEC. 23. The surveyor general shall receive for his services, under the provisions of this act, and for any assistance he may require, the sum of one thousand dollars; provided, that one copy of the map herein required to be made, shall be the property of the State, and be turned over to his suc-

cessor in office. When the governor shall receive from the surveyor general the map, affidavits, and report, herein required of him, the governor shall give to the surveyor general a receipt therefor, which receipt shall be a voucher upon which he may present his claim to the board of examiners, who are authorized to allow his account, payable out of the swamp-land fund.

SEC. 24. It shall be the duty of the board of commissioners to settle with and adjust the claims of the county surveyor and other persons employed in selecting and segregating the swamp and overflowed lands in their respective counties, under the provisions of this act. Said board shall have power, and they are hereby authorized to administer oaths, or affirmations, and to examine, under oath, claimants and other persons that they may call before them relating to such claims; and the board may certify to the board of State examiners such allowance as shall appear right and proper in the premises. Upon the approval of the account of the board of State examiners, the controller may issue his warrant in payment for the same out of the swamp-land fund; provided, that in no case shall the county surveyor receive more than eight dollars per day, nor his assistants more than four dollars per day.

SEC. 25. The board of commissioners shall ascertain the aggregate amount of the cost for the segregation and surveying of all the swamp and overflowed lands in each county, and divide the said amount by the number of sections of swamp land in each county; the cost per section thus ascertained, the board of commissioners shall certify to the county treasurers, and thereafter purchasers shall pay to the county treasurers, prior to the issuance of a certificate, the cost of survey and segregation thus ascertained.

SEC. 26. After the survey by sections and the segregation contemplated by this act has been made, ANY PERSON *desirous of purchasing swamp and overflowed lands* shall file an affidavit in the office of the county surveyor of the county in which the land is situate, that he has not purchased any other land under the provisions of any act to provide for the

sale of swamp and overflowed lands belonging to this State, which, with the lands sought to be purchased, shall exceed six hundred and forty acres; that he has no knowledge of any other legal, or equitable, claim than his own to the tract of land desired to be purchased by him. It shall be the duty of the county surveyor to make out a plat and field-notes for each applicant from the map on file in his office, and forward a certified copy of the same to the surveyor general, in accordance with An Act to provide for the sale of the swamp and overflowed lands of this State, approved April eighteenth, A. D. eighteen hundred and fifty-nine.

SEC. 27. *The provisions of this act shall apply equally to all salt, marsh, or tide, lands in this State, as to swamp and overflowed.*

SEC. 28. The sum of two hundred thousand dollars, now in the swamp-land fund, or hereafter to be received into the swamp-land fund, is hereby appropriated and set apart as a fund to be applied and expended under the provisions of this act, as hereinafter provided.

SEC. 29. This act shall take effect and be in force from and after its passage.

II.

CHAP. CCXXXV.—*An Act to provide for the Sale and Reclamation of the Swamp and Overflowed Lands of this State.*

[Approved April 21, 1858.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The swamp and overflowed lands belonging to this State, or that may hereafter be granted to this State by Act of Congress, entitled "an act to enable the State of Arkansas, and other States, to reclaim the swamp lands

within their limits," passed September twenty-eight, eighteen hundred and fifty, shall be sold at the rate of one dollar per acre, in manner prescribed by this act; and the proceeds of the sales thereof, under this or any former act shall be paid into the Treasury of this State, as State Revenues, and shall be credited to the account of a swamp land fund, to be appropriated for the reclamation of said lands, as the Legislature may hereafter direct; *Provided*, that, if upon the survey of such lands, any portion thereof shall be found to be lands belonging to the State by right of her sovereignty, the moneys arising therefrom shall be paid into the Treasury of the State as other State revenues.

SEC. 2. Any person, who may be entitled by the laws of this State to become a citizen thereof, wishing to purchase land under the provisions of this act, shall file an affidavit in the surveyor's office of the county in which the land sought to be purchased, or the larger portion thereof, is situated, that he has not entered any other land under the provisions of this act, or under the provisions of an act passed April twenty-eighth, eighteen hundred and fifty-five, entitled "an act to provide for the sale of the swamp and overflowed lands belonging to this State," which, with the land sought to be purchased, shall exceed three hundred and twenty acres, and that he does not know of any legal or equitable claim, other than his own, to the land sought to be purchased; that such purchase is sought for the purpose of settlement and reclamation by affiant; and that he has not directly, nor indirectly, made any agreement or contract, in any way or manner, with any person, or persons, whatsoever, by which the title he may acquire from the government of the State should inure, in whole or in part, to the benefit of any person except himself. He shall then cause the land sought to be purchased to be surveyed; or, in case of a previous legal survey, shall cause the said survey to be approved and certified by the county surveyor of the county in which such land, or the larger [portion] thereof, is situated.

SEC. 3. It shall be the duty of said county surveyor to make out a plat and field notes of every survey made or ap-

proved by him under the provisions of this act; he shall record the same in his office, and forward duplicate certified copies of the same to the Surveyor General of this State, within ten days after such survey may be completed or approved, as aforesaid, together with a copy of the affidavits required by section two of this act. And it shall be the duty of the Surveyor General, when the survey, upon examination, is found to be correct, to return one of the duplicate copies, with his approval endorsed thereon, to the said county surveyor, to be by him delivered to the person for whom the survey was made, and the county surveyor shall record the approval of the same in his office; and it shall also be the duty of the Surveyor General, when the survey has been made according to the provisions of this act, to file the same in his office, and to transmit a copy to the rigister of the land office of this State.

SEC. 4. The purchaser of land under the provisions of this act, shall, within thirty days after the record of the approval of the Surveyor General, as aforesaid, and upon presentation of such plot and field notes for record, approved by the Surveyor General as aforesaid, pay to the county treasurer of said county, one dollar per acre for all the land contained in such survey, which may be paid in money, and take said treasurer's duplicate receipts for the same, and have such receipts recorded in the office of the county auditor immediately upon the receipt of the same, and it shall be the duty of the county auditor to transmit a certified copy of said receipts to the register of the land office as soon as it is recorded in his office.

SEC. 5. It shall be the duty of the county treasurer of such county to pay over to the Treasurer of this State, at the same time and in the same manner as other State revenues, all moneys received by him under the provisions of this act; and he shall at the same time transmit to the State Controller a certificate showing the name of the purchasers, the numbers of the surveys, as shown by the records of the county surveyor, and the number of acres purchased, and the amount of money to be credited to the swamp land fund.

SEC. 6. It shall be the duty of the State Treasurer, upon receipt of the purchase money, according to the provisions of this act, to certifiy the same to the register of the land office, whose duty it shall be to issue a certificate of purchase to the purchaser, designating the lands purchased, by their proper sections, townships, and ranges, connecting with the United States surveys, unless the location has been made for the protection of the actual settler, as hereinafter provided. But the register shall not issue a second certificate of purchase of the same land; nor shall the name of one purchaser be substituted for another at any time before the certificate is issued by the register, as provided in this act.

SEC. 7. The certificate of purchase issued by the register, as aforesaid, or by the the Secretary of State, under the provisions of an act entitled "an act to provide for the sale of the swamp and overflowed lands belonging to this State," passed April twenty-eighth, one thousand eight hundred and fifty-five, shall be *prima facie* evidence of title, and all persons holding any such certificate, or certificates, of the register, shall present the same to the Governor of this State; and, should the Governor find that the land, or a part of the land, designated in said certificate, belongs or has been confirmed to the State, and the whole amount of purchase money, together with interest thereon, has been paid, he shall issue a patent for said land, or said part of said land, to and in favor of the original holder of the surrendered certificate, or to his legal representatives; or, in case such original certificate has been assigned, then to the last assignee of such certificate, or to his legal representative, and the title shall vest in such assignee or legal representative as effectually as if he had been the original purchaser; *Provided*, that neither the patent provided for in this section, nor the certificate provided for in the sixth section of this act, shall have any other legal effect or force than as a quit-claim of all right, title, and interest, on the part of the State.

SEC. 8. No person shall become the original purchaser, as aforesaid, under the provisions of this act, of more than three hundred and twenty acres, and the same must be taken in

quarter sections, according to the United States survey, except as hereinafter provided for the protection of actual settlers, or where such location is impracticable, or where smaller subdivisions are found necessary, in order to make up three hundred and twenty acres, or the number of acres sought to be purchased, and so certified by the county surveyor; then, and in that case, the next legal subdivision or fractional section may be taken; *Provided*, the whole does not exceed three hundred and fifty acres, or measure more than one-half mile front on any bay or navigable stream.

SEC. 9. Any person, or persons, having or holding a settler's claim, under the laws of this state for the protection of settlers, or having or holding a claim by right of actual possession, or having or holding a claim by survey and location, to swamp lands excepted from the provisions of the act entitled "an act to provide for the sale of the swamp and overflowed lands belonging to this State," passed April twenty-eight, one thousand eight hundred and fifty-five, upon any of the swamp and overflowed lands embraced within the provisions of this act, shall be protected in his, her, or their possession, according to the boundary lines of said possession or location; *Provided*, that he, she, or they shall, within twelve months from and after the passage of this act, comply with all the other requirements of purchasers under the provisions of this act; *Provided, further*, that the said claim shall not exceed three hundred and twenty acres, or measure more than one-half mile front, by legal subdivision, on any bay, lake, or navigable stream.

SEC. 10. When there are conflicting claims to such lands, the register may administer oaths, and shall, upon proper notice to the parties, and upon hearing testimony and statements under oath, decide to whom the certificate shall be issued, in accordance with the law on the subject, and shall issue the certificate accordingly.

SEC. 11. All surveys under the provisions of this act, shall be made according to the instructions from the Surveyor General, and shall be made to conform to the surveys of the public lands by the general government, except that the

eight hundred and fifty, as a rule of determination. He shall then cause the land sought to be purchased, to be surveyed, or, in case of a previous legal survey, shall cause said survey to be approved and certified by the County Surveyor of the County in which such land, or the greater portion thereof, is situated.

SEC. 2. Section four of said act is hereby amended so as to read as follows:

Section four—The purchaser of land, under the provisions of this Act, shall, within thirty days after the record of the approval of the Surveyor-General, as aforesaid, and upon presentation of such plot and field-notes, for record, approved by the Surveyor-General, as aforesaid, pay to the County Treasurer of said County, one dollar per acre, for all land contained in such survey, which may be paid in money, and take said Treasurer's duplicate receipt for the same, and have such receipt recorded in the office of the County Auditor, immediately upon the receipt of the same, and it shall be the duty of the County Auditor to transmit a copy of said receipt, to the Register of the Land Office, as soon as it is recorded in his office.

Any person, or persons, however, wishing to purchase lands under the provisions of this Act, may, if preferred by such purchaser, or purchasers, pay twenty per cent. of the principal, and ten per cent. interest, per annum, on the balance, yearly in advance, for the term of five years; said twenty per cent. of the principal and first year's interest on the balance to be paid at the time, and in the manner, as above provided for payment in full; *Provided*, that if any person, or persons, purchasing lands upon said credit of five years, shall fail, or neglect, to pay twenty per cent. and first year's interest, within thirty days from record of approval of the Surveyor-General by the County Surveyor, or shall fail to pay the interest yearly in advance, or shall fail to pay the principal within the said term of five years, from date of purchase, such neglect, or failure, shall work a forfeiture of such lands and the partial payments made, and the same shall be re-sold, as if no purchase had been made. Interest,

in all cases, shall be computed from the date of the approval of the Surveyor-General, of the survey, which shall be held to be the date of purchase. And all persons purchasing lands, shall, at the time of making their first payment, pay to the County Treasurer the fee allowed by law for a certificate of purchase; said fee to be subject to the order of the Register of the State Land Office.

SEC. 3. Section eight is hereby amended so as to read as follows:

Section eight---No person shall become the original purchaser, as aforesaid, under the provisions of this Act, of more than six hundred and forty acres, and the same must be taken in quarter sections, according to the United States survey, except as hereinafter provided, for the protection of actual settlers; where such location is impracticable, or where smaller subdivisions are found necessary, in order to make up six hundred and forty acres, or the number of acres sought to be purchased, and so certified by the County Surveyor, then, and in that case, the next legal subdivision, or fractional section, may be taken; *Provided*, the whole does not exceed six hundred and forty acres, or measure more than one-half mile front, on any bay or navigable stream.

SEC. 4. Section nine is hereby amended so as to read as follows:

Section nine—Any person, or persons, having, or holding, a settler's claim, under the laws of this State for the protection of settlers, or having, or holding, a claim by right of actual possession, or having, or holding, a claim by survey and location, to any swamp lands, excepted from the provisions of the Act entitled "An Act to provide for the sale of the swamp and overflowed lands belonging to this State," passed April twenty-eighth, one thousand eight hundred and fifty-five, upon any of the swamp and overflowed lands embraced within the provisions of this Act, shall be protected in his, her, or their possession, according to the boundary-lines of said possession, or location; *Provided*, that he, she, or they, shall, within twelve months from and after the passage of this Act, comply with all the other requirements

of purchasers, under the provisions of this Act; *Provided, further,* that the said claim shall not exceed six hundred and forty acres, or measure more than one-half mile front, by legal subdivision, on any bay, lake, or navigable stream.

SEC. 5. Section ten of said Act is hereby amended so as to read as follows:

Section ten—In all cases where a contest for the certificate of purchase, or other evidence of title, to the same tract of land, shall arise before the Register, when such contest is purely as to the survey, the Register shall determine the same, according to the facts, and issue his certificate therefor, to the person whom he shall determine to be entitled thereto. Whenever, in the judgment of the Register, a question of law alone, or of law and fact, is involved in such contest, or when either party shall demand a trial of such questions in the Courts of the State, said Register shall enter such judgment, or demand, of either of the parties, in the record of the proceedings had before him, together with a direction that the parties to such contest are referred to the Courts of the State for a legal determination of said contest, or conflicting claim. Either party to such contest may bring his action in the District Court of the County in which the land in dispute is situate, to determine such conflicting claim, and the proffer of a certified copy of said entry made by the Register, and upon service and return of process, as in other civil cases, shall give to said District Court full and complete jurisdiction to hear, try, and determine, said conflicting claim. Upon filing with the State Register a certified copy of the final judgment or decision of said District Court, said State Register shall issue his certificate, or other evidence of title, in accordance with such decision. For services to be rendered by the Receiver, as prescribed by this Act, he shall be entitled to demand and receive, as a fee, the sum of ten dollars, in each case, to be deposited, equally, in advance, by the parties contesting, and on the filing, hearing, or termination, of such contest, when finally determined by him—or on certifying the proceedings, had by him, as aforesaid, it shall be lawful for him to assess equally, in whole or in

part, the above sum to either of the parties contestant, and for each certificate of purchase or patent he shall be entitled to demand the sum of five dollars.

SEC. 6. All lands purchased under the provisions of this Act shall be held to be taxable from and after date of purchase.

IV.

CHAP. CLXXXVI.—*An Act supplemental to an Act entitled an Act to provide for the Reclamation and Segregation of Swamp and Overflowed, and Salt Marsh, and Tide Lands, donated to the State of California, by Act of Congress, approved May thirteenth, one thousand eight hundred and sixty-one.*

[Approved April 11, 1862.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Upon the completion of the survey and estimates of the cost of permanent reclamation of a Swamp Land District, established, or to be established, by the Board of Swamp Land Commissioners, it shall be the duty of said Board of Commissioners to procure, from the Registrar of the State Land Office, a certified statement of the amount of money paid into the Swamp Land Fund of the State, by the purchasers of land within such District, and to file said statement, together with a list of the Swamp and Overflowed, Salt Marsh, or Tide Lands, included in such District, with the Controller of State; said Board shall also file a statement of the amount of money that has been expended in the survey of said District, and in other expenses incidental thereto; *and the money then in, or thereafter received, in the Swamp Land Fund, as having been paid by the purchasers of land within the District thus certified, less the amount expended in the survey, shall be set apart by the Controller and Treasurer of State, from the Swamp Land Fund, as a Special Fund, to*

the credit of such District, to be applied in the reclamation of said District as is provided in the Act to which this Act is supplemental; provided, that in no case shall more than one dollar for each acre of the Swamp, Tide, or Marsh Land, in such District, be thus set apart from the Swamp Land Fund, excepting that where more than one dollar per acre is paid, as is hereinafter provided, the whole sum so paid shall be thus set apart; provided, further, that the salaries of Commissioners, and all general expenses not properly chargeable to a particular District, shall be paid from the Swamp Land Fund, and upon the final reclamation of a District, the Commissioners shall ascertain the amount of such expenses properly chargeable to the tract of land so reclaimed, and certify the same to the Controller, whereupon, such amount, so ascertained, shall be transferred by the Treasurer and Controller from the Fund of the District to the Swamp Land Fund.

SEC. 2. The Board of Swamp Land Commissioners shall also cause to be recorded, by the County Recorder of each county in which a District, or part of a District, finally established by them, may be situate, a certified statement of the boundaries of the District, together with a detailed list, by sections and subdivisions of sections, of all the Swamp, Marsh, or Tide Lands, embraced in said District. They shall also file with the Treasurer of each county in which such lands are situated, a certified list, and map, showing the lands, by sections and subdivisions of sections, embraced in such District.

SEC. 3. Upon the receipt of the certified list and map, the County Treasurer shall open an account with each District thus certified, and credit said District with any money that may then be in his hands, and receive as principal or interest for any Swamp, Tide, or Marsh Lands; included in said District; and all money thus placed to the credit of a District, or thereafter received for land within a District, as principal or interest, or for the tax hereinafter authorized to be levied, shall be by him received for the use of, and paid into the State Treasury to the credit of, the Special Reclamation Fund of the District from which it was received.

SEC. 4. If, from the report and estimates of the Engineer, and after the approval of the plan of reclamation by the Board of Commissioners, it shall appear that the amount in the State Treasury, to the credit of a District, be not sufficient to reclaim said District, the Board of Supervisors of each county in which such District, or part of a District, may be situated, shall, and they are hereby required, upon presentation of a petition from the holders of patents, or certificates of purchase, of Swamp, Tide, or Marsh Lands, within the District, representing one third in acres of the whole of said District, levy a tax on all real estate, and improvements on real estate, within their county, and within the boundaries of such District, including only real estate and improvements to be protected from overflow by the reclamation of such District, which tax shall, in the aggregate, when added to the amount in the State Treasury to the credit of such District, equal the amount of the cost of permanent reclamation, as estimated and returned by the Engineer for said District.

SEC. 5. The tax thus authorized to be levied, shall be collected as other taxes are required to be levied and collected; and the laws for the collection of State and county taxes are hereby made applicable to the tax authorized to be levied and collected under the provisions of this Act; *provided*, that the tax shall be levied and collected on the assessment of real estate and improvements made for the current fiscal year during which the petition was received.

SEC. 6. The tax thus authorized to be levied and collected, shall be paid into the State Treasury, to the credit of the Fund of the District from which it was received, to be applied in the reclamation of such District, under the provisions of the Act of which this is supplemental.

SEC. 7. After said tax shall have been levied, it shall be the duty of the County Treasurer to collect, from the purchaser of any Swamp, Marsh, or Tide Lands, in such District, not theretofore sold, the amount of said tax on the aggregate of his purchase, at the rate of one dollar per acre, in addition to the amount of principal and interest now required by law

to be paid; and said amount, with the principal and interest, and cost of survey, shall be paid into the State Treasury, to the credit of the Reclamation Fund of the District.

SEC. 8. If any person shall, at any time, or in any manner, lower or alter any levee, to facilitate crossing, or shall cut, destroy, or in any other manner whatever injure or destroy, any levee, or tide-gate, or embankment, or other work, constructed for the purpose of reclamation, or in any manner whatever diminish the height, width, or strength, of any levee or embankment of a District, or cross levee within a District, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not less than ten days nor more than six months, or by both such fine and imprisonment; and in every case of conviction, the sum of fifteen dollars shall be charged as costs, and be paid to the Prosecuting Attorney, for his own use; and all fines collected under this Act shall be paid into the Levee Fund of the District.

V.

CHAP. CCXVIII.—*An Act for the Relief of Purchasers of Swamp and Overflowed, Salt Marsh, and Tide Lands.*

[Approved April 10, 1862.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. All interest, due and unpaid, or that may become due, within one year after the passage of this Act, on all swamp and overflowed, TIDE, and marsh lands, which have been sold under the provisions of any Act providing for the sale of said swamp and overflowed, tide, and marsh lands, of this State, is hereby remitted; *provided*, that there shall not,

in any case, be more than one year's interest remitted on any of the said lands; but all subsequent payments shall be due on the same day and month of the year in which they would have been due had not one year's interest been remitted.

SEC. 2. All laws, and parts of laws, in conflict or inconsistent with the provisions of this Act, are hereby suspended for one year.

SEC. 3. This act shall take effect from and after its passage.

VI.

CHAP. CXVIII.—*An Act for the Relief of Purchasers of Swamp and Overflowed, Salt Marsh, and Tide Lands.*

[Approved March 31, 1863.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. All interest due and unpaid, or that may become due within one year after the passage of this Act, on all Swamp and Overflowed, *Tide*, and Marsh Lands, which have been sold under the provisions of any Act providing for the sale of said Swamp and Overflowed, *Tide*, and Marsh Lands of this State, is hereby remitted; *provided*, that there shall not, in any case, be more than one year's interest remitted by virtue of this Act on any of the said lands; but all subsequent payments shall be due on the same day and month of the year in which they would have been due, had not one year's interest been remitted.

SEC. 2. All laws and parts of laws in conflict or inconsistent with the provisions of this Act are hereby suspended for one year, and this Act shall take effect from and after its passage.

CHAP. CCCCXX.—*An act to provide for the Reclamation of Salt Marsh and Tide Lands.*

[Approved April 27, 1863.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. *All parties holding certificates of purchase for Salt Marsh and Tide Lands belonging to this State, any portion of which is subject to overflow by high tides, and purchased under any Act that has been or may hereafter be passed for the sale of the same, and who are desirous of reclaiming the said lands,* shall file with the Clerk of the District Court in the county in which the land or the largest part thereof is situated, a petition, asking for the benefits conferred by this Act, and setting forth the location and quantity of the land by section, township, range, and meridian, as surveyed by the County Surveyor, based upon the township exteriors, or other public lines of the United States surveys, (accompanied by a plat of the same,) an abstract of the title thereof, under what Act originally purchased, and that it is the intention of the petitioner, or petitioners, within the term of three years, to reclaim the same, or that the lands have been reclaimed previous to the date of the passage of this Act.

SEC. 2. Whenever the holders of certificates of purchase or patents, representing one half of any large body of Salt Marsh and Tide Lands, described in section one of this Act, which may be reclaimed by one general system of reclamation, desire to reclaim such tract, they shall file the certificate as required in section one of this Act, together with a statement of the quantity of land in the whole tract, the amount represented by the patents and certificates of purchase of the petititioners, the amount not represented, and, if possible, the names of the owners thereof. The petitioners may then proceed with their works of reclamation upon such plan as they may adopt, assessing the cost thereof, as the progress of the work requires, upon each holder of any land

within the tract, in the proportion which the number of acres so held by him bears to the whole tract, which assessment shall be due as soon as levied, and shall be a lien upon the land, and be collectable in any Court of competent jurisdiction, by any Agent whom the petitioners may appoint for the purpose.

SEC. 3. The Clerk of the District Court in the proper county shall keep a book of record, setting forth the date of petition, the name or names attached thereto, the numbers of the certificates of purchase of the land sought to be reclaimed, the location of the land by section, township, range, and meridian, with reference to the United States surveys, the title, from whom acquired, and under what Act the location was originally made, together with a brief abstract of the proceedings had thereon in the District Court.

SEC. 4. At any time within the period of three years after filing said petition, if the lands have been reclaimed, the petitioners, or petitioner, or a majority of them, their assigns, or legal representatives, may file with the Clerk of said District Court an affidavit, setting forth that the petition mentioned in section one has been filed, with the date thereof, and that the lands described therein have been reclaimed within three years of the filing of said petition, giving an accurate description of the method of reclamation, the length and size of levees, ditches, etc., and the cost of same. They shall also file the affidavit of the County Surveyor, or his Deputy, and two or more reliable land owners of the county in which the proceedings are had, setting forth that they know the lands described in the petition, that they have examined the works of reclamation since completion, and that they regard them as sufficient to protect the lands inclosed or drained by them from overflow, and that, to the best of their judgment, the land so reclaimed will no longer be subject to inundation by high tides to which they had hitherto been subjected. They shall also declare that they have not, directly or indirectly, any interest in the lands so reclaimed. The Clerk shall thereupon enter the same on the docket of said Court, for a hearing at the next term thereof, which cause shall be heard,

shall be entitled to a credit upon such purchases of only the cost of such reclamation, and the balance shall be due and payable within three and a half years from the date of filing the petition named in section one of this Act; and if the lands have been paid for in full, the owner or owners thereof shall be entitled to receive from the State only the cost of such reclamation.

SEC. 12. The Clerk of the Court in which any proceedings shall be had under the provisions of this bill, shall be entitled to receive for all services performed by him in such proceeding, including the entry and copy of decree to be rendered, the sum of ten dollars for each single petition, and one dollar for each and every petitioner when two or more are joined in the same petition.

SEC. 13. All acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

VIII.

CHAP. CCCCXIX.—*An Act in relation to Swamp Land District Funds.*

[Approved April 4, 1864.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Upon the segregation of a Swamp Land District by the Board of Swamp Land Commissioners, under the provisions of an Act entitled an Act to provide for the reclamation and segregation of Swamp and Overflowed, and Salt Marsh, and Tide Lands, donated to the State of California by Act of Congress, approved May thirteenth, eighteen hundred and sixty-one, and under the provisions of the several Acts supplemental and amendatory thereto, and upon the certificate of the said Board of Commissioners, as required in said Acts, being filed with the Controller and Treasurer, the total

amount of money in the Swamp Land Fund belonging to a district thus certified, is hereby set apart and appropriated, to be expended in the reclamation of said district.

SEC. 2. This Act shall take effect from and after its passage.

IX.

An Act to provide for the sale of the marsh and tide lands of this State.

[Approved May 14, 1861, 363.]

SECTION 1. The sales of all marsh and tide lands belonging to this State, that have been made in accordance with the provisions of any of the acts of the legislature, providing for for the sale of the swamp and overflowed lands belonging to this State, are hereby ratified and confirmed; and any of said marsh and tide lands that remain unsold, may be purchased under the provisions of the laws now in force, providing for the sale of the swamp and overflowed lands of this State; and all moneys derived from the sale of such lands shall be paid into the State swamp-land fund, to be used for the reclamation of the swamp and overflowed lands; provided, no marsh or tide lands, located within five miles of the City of San Francisco, or of the City of Oakland, or within one mile and one-half of the State prison grounds, at Point San Quentine, shall be sold, or purchased, *by authority of this act;* and provided, further, that no sales of lands, either tide or marsh, excepting alcalde grants, which are hereby ratified and confirmed, within five miles of said cities, or within one mile and one-half of the State prison grounds aforesaid, shall be confirmed by this act.

SEC. 2. This act shall take effect from and after its passage.

The act of April 27, 1863, statutes of that years, pages 591 to 601, is a long act of 31 sections, providing for the sale of swamp, and overflowed, marsh and TIDE lands.

The following are sections 30 aud 31 of that act:

SEC. 30. This Act SHALL NOT apply to the Marsh and TIDE LANDS upon the city front and *within five miles of the city and county of San Francisco*, and of the City of Oakland, and one mile of the State prison at San Quentin.

SEC. 31. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

The statutes of 1863, and 1863–4, are in the library.

X.

CHAP. DCXVI.—*An act to authorize the sale and conveyance to William Alvord, his associates and assigns, of certain overflowed lands in the City aud County of San Francisco.*

[Approved April 2, 1866.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. William Alvord, his associates and assigns, are hereby authorized to have a survey made at their own expense, by the City and County Surveyor of San Francisco, of certain submerged and tide and marsh lands belonging to the State, situated in the City and County of San Francisco, to wit: Blocks numbered upon the map or plan of the "Potrero Nuevo," made by William J. Lewis in June, (1856,) eighteen hundred and fifty-six, Four Hundred and Eighty-six, Four hundred and Eighty-seven, Five hundred and Six, and Five Hundred and Seven, being bounded on the north by Butte street, on the west by Maryland street, on the south by Shasta street, on the east by Massachusetts street, and containing in all not to exceed eight acres; and upon the approval of his survey by the Surveyor-General, and upon the payment by said Alvord, his associates or assigns,

to the Treasurer of the State, to the credit of the "Wharf and Dock Fund," the value of said land after the same has been ascertained by the State Harbor Commissioners, at a sum of not less than one hundred dollars per acre, for the number of acres so ascertained, the Register of the State Land Office shall certify said approval and payment to the Governor, whereupon a patent shall issue for said land to said Alvord; *provided*, this description shall not include more than the blocks numbered upon the aforesaid map Four Hundred and Eighty-six, Four Hundred and Eighty-seven, Five Hundred and Six, and Five Hundred and Seven, with the adjacent streets; *provided*, further, that no portion of the purchase money shall be returned to the purchasers under the provisions of any of the laws of this State.

SEC. 2. *Provided*, That before such patent shall issue, said Alvord and his associates or assigns, shall commence the construction of a manufactory, on or near the upland adjoining the submerged lands herein authorized to be conveyed, for rolling iron, and for such other purposes in connection therewith as they may judge expedient, and shall so far complete the same within three years from and after the passage of this Act as to be capable of rolling therein at least fifty tons of railroad iron per month, otherwise this Act shall be void and of no effect; *provided*, that no patent shall issue until the provisions of this section are complied with; and *provided*, further, that the provisions of this *Act shall not interfere with any vested rights heretofore acquired by other* PURCHASERS.

SEC. 3. Any wharf or dock which may be built on said lots or on the aforesaid described property, shall be subject to the same laws, rules, and regulations as govern other wharves, under the supervision of the State Harbor Commissioners.

SEC. 4. This Act shall take effect from and after its passage.

XI.

From report of the Surveyor General of California for 1864 and '5, Appendix to Journal of Senate and Assembly, Vol. 1, 16th Session, page 100.

TIDE LANDS.

The subject of the sale of marsh and tide lands within five miles of the Cities of San Francisco and Oakland, and one mile and a half of the State Prison, seems to have assumed an importance which I had not given it one year ago, when your attention was called to it in my annual report, nor does its importance seem to have been appreciated by the Honorable Board of Swamp Land Commissioners in May, eighteen hundred and sixty-four, when, in an official report to this office, they certified that the lands of this character sold by an Act of the Legislature (under an appraisal, to be made by them) to the Golden City and North San Francisco Homestead Associations, were worth three dollars per acre; nor could it have been apprcciated by them in June of the previous year, when, in an official report to this office, they certified that the lands sold by an Act of the Legislature (under an appraisal, to be made by them) to the South San Francisco Homestead Association, were worth one dollar per acre.

The importance which has since been given to this subject induces me to give more fully than in my last report the circumstances under which certificates of purchase for some of this class of lands, in the vicinity of San Francisco and Oakland, were issued. The first demand since I have been in this office for a certificate of purchase of any marsh and tide lands within five miles of the Cities of San Francisco and Oakland, or one mile and a half of the State Prison, was made by the attorney of Mr. A. Lusk, for one hundred and twenty acres of land surveyed by the County Surveyor of Alameda county.

Although, after careful consideration of the laws, I agreed with him that either by design or careless legislation the

lands were not exempted from sale, I refused to issue the certificate unless sustained by some other authority, that it was my duty to do so, and the question was referred to the Attorney-General by letter, referring him to all the laws on the subject, and stating fully the case, as follows:

STATE OF CALIFORNIA, STATE LAND OFFICE,
Sacramento, February 23, 1864.

To Hon. J. G. McCULLOUGH,
Attorney-General:

Albert Lusk has made application for a certificate of purchase for one hundred and twenty acres of salt marsh and tide land in Alameda County. It has been regularly surveyed, the survey approved, and the twenty per cent. and the first year's interest paid to the County Treasurer. There is no counter claimant, and no person making opposition. The law for the purchase of this land has been strictly complied with. I have heretofore refused to issue certificates of purchase of marsh and tide lands within five miles of the Town of Oakland, upon the supposition that they, as well as swamp and overflowed lands, were excluded from sale. This piece of land is at the outer limit, but within the five miles of Oakland. Lusk contends that section thirteen of the Act for the sale of swamp and overflowed lands, passed April eighteenth, eighteen hundred and fifty-eight, (on which I have relied as excluding these lands from sale,) expressly provides in terms that they may be sold. He also contends that the legislation providing for their sale continued in force and was reconfirmed in express terms by sections twenty-six and twenty-seven of the Act for the segregation and reclamation of swamp, marsh and tide lands, and approved May thirteenth, eighteen hundred and sixty-one. He further contends that the Act of May fourteenth, eighteen hundred and sixty-one, providing for the sale of salt marsh and tide lands, did not repeal former Acts, but ratified and confirmed sales made under them, and continued their provisions in full force, its prohibitions being intended to apply only to any attempt at

purchase under its own provisions, leaving unrepealed the Acts of eighteenth of April, eighteen hundred and fifty-nine, and May thirteenth, 1861, providing for the sale of these lands. The only other Act having any bearing upon the subject is the Act of April twenty-seventh, eighteen hundred and sixty-three, and by reading section thirty it will be seen that these lands are entirely excluded from its provisions. A critical reading of the law has convinced me, that while my rulings have been correct in relation to swamp and overflowed lands within the boundaries mentioned, I should be doing injustice to applicants in making this ruling apply to marsh and tide lands. I certainly ought not to continue to refuse to issue this certificate, if not clearly sustained by the law; for I have no wish to invite litigation and personal expense, to have the Courts decide that my rulings are what the law should be, and not what it really is.

Shall I issue the certificate of purchase, or refuse and contest the case in the Conrts?

Very respectfully, etc.,

J. F. HOUGHTON, Register.

By A. S. BENDER, Deputy.

Early in the month of March, no answer having been received to the above, at the request of Mr. Lusk's attorney I went with him to the office of the Attorney-General, who told me that he had examined the subject, and that the laws did not seem to exclude from sale the marsh and tide lands within five miles of San Francisco and Oakland, and one mile and a half of the State Prison; but that he did not like at that time to give a full written opinion to that effect, as he was then engaged on behalf of the State in a suit to set aside a patent issued by Governor Downey for tide lands covering part of the prison brick yards, and such an opinion would be equivalent to an abandonment on the part of the State of her position in that case.

Upon examination of the records of my office, I found that while Mr. Higley was Surveyor-General, Governor Downey

had issued patents to the following persons for tide lands near the State Prison:

Date.	To Whom.	Acres.
April 18th, 1860.....	J. F. McCauley, for.....	40.35
August 8th, 1860.....	George N. Cardwell, for..	50.33
October 23d, 1860.....	Martha Buckelew, for...	11.84

All of which tracts were in close proximity to the State Prison, and the first named conveyed part of the brick yards.

The fact was also brought to my notice that in a suit brought at the instance of the Board of State Prison Directors, to set aside the first named patent, the Honorable Judge Southard, of the Seventh Judicial District Court, rendered a decision against the State, and sustaining the validity of the patent. (This case was subsequently abandoned on the part of the State, and the land purchased from the claimant under the tide land patent, for the use of the prison.)

On the twenty-third day of May I received from the Attorney-General the following reply to my letter of February twenty-third:

STATE OF CALIFORNIA, ATTORNEY GENERAL'S OFFICE,
Sacramento, May 23d, 1864.

Hon. J. F. HOUGHTON,
Surveyor-General, Register, etc.

DEAR SIR:—In reply to your question contained in a communication to me of February twenty-third, eighteen hundred and sixty-four, (which would long since have been answered, as I have explained to you verbally, had not the State's interests been involved in a similar case,) whether you were authorized to issue to one Albert Lusk a certificate of purchase to certain lands situate within five miles of the Town of Oakland, and belonging to the quality of salt marsh and tide; reserving still a full answer to the general question involved in your letter, for the same reason that I have so

long delayed this reply, and *only* for that reason, I advise you in this particular case to issue the said certificate to Mr. Lusk, upon his full compliance with the other provisions of the law.

I remain truly,

J. G. McCULLOUGH,
Attorney-General.

Upon the receipt of this letter, Mr. Lusk's certificate was delivered, and on the second day of June, evidence of full payment having been received with an application for a patent, it was made out and sent with the proper certificate, inclosed with the following letter fully explaining the case:

STATE OF CALIFORNIA, STATE LAND OFFICE,
Sacramento, June 2d, 1864.

His Excellency, FRED'K F. LOW,
Governor of California:

DEAR SIR:—In February last Mr. Albert Lusk made application to this office for a certificate of purchase for salt marsh and tide lands situate between four and five miles from the City of Oakland. Up to that time it had been the practice of this office to regard such lands as exempt from sale under section thirteen of the Act of April twenty-first, eighteen hundred and fifty-eight, but upon a careful consideration of that Act, and the Acts of May thirteenth, eighteen hundred and sixty-one, (sections twenty-six and twenty-seven,) May fourteenth, eighteen hundred and sixty-one, and April twenty-seventh, eighteen hundred and sixty-three, I became satisfied that such practice was contrary to law, but refused to change the practice unless upon the opinion of the Attorney-General.

On the twenty-third of February, I stated the case to the Attorney-General, asking him what my duty was in the premises. A copy of this letter, with his reply, dated May twenty-fifth, is herewith inclosed, and in accordance with it I have issued the certificate.

Mr. Lusk has made payment in full and applied for his patent, certificate for which I send herewith. As this is the first instance in which a certificate has issued to any lands heretofore regarded by me as exempt under the Act first referred to, I desire to call your attention to it, that you may satisfy yourself before signing the patent.

I am, very truly,

Your obedient servant,

J. F. HOUGHTON,

Register of the State Land Office.

On the seventh day of June the patent was returned to my office, signed by the Governor. Up to this time no certificates of purchase of any of the lands in question had been delivered from this office, except the one referred to as delivered to Mr. Lusk; but actuated only by a desire to know and perform my duty according to law, as bound by my oath of office to do, and regarding the accumulated evidence herein presented as sufficiently conclusive upon this point, from that time until the tenth day of December of that year certificates of purchase were issued to applicants who had in all respects complied with the law.

On that day I received a letter from the Attorney-General advising me to stay all proceedings in regard to the sale of the lands in question just where they were, which advice I have strictly followed.

On the twelfth day of December, two days later, the Attorney-General wrote me, referring me to the decision of the Supreme Court in the case of the People *ex rel.* Pixley, Attorney-General v. Morrell, which he regarded as settling the question against the sale.

Between the seventh day of June and tenth day of December, certificates of purchase were issued to twenty-seven applicants, for one thousand three hundred and thirteen and sixty-five one-hundredths acres within five miles of San Francisco, and to forty-four applicants for four thousand six

hundred and eight and twenty-six one-hundredths acres within five miles of Oakland, upon surveys and applications forwarded to this office by the County Surveyors of the respective counties.

Thirteen surveys and applications have been returned by the County Surveyor of San Francisco, embracing five hundred and ninety-five and forty-two one-hundredths acres more of these lands, which, under the last letter of the Attorney-General, have been refused any action whatever in this office.

Three patents were, upon application, prepared for lands in Alameda County, and forwarded to the Governor, which have not been returned or issued.

No patents for any of these lands within five miles of San Francisco have been applied for, and consequently none have been prepared, and will be refused if applied for.

In concluding this subject, I desire to renew the recommendation contained in my last report in regard to the repeal of the laws relating to the sale of the lands in question.

IN THE

Supreme Court of the United States.

WILLIAM T. O'NEIL,
Plaintiff in Error,
vs.
JOHN KIRKPATRICK,
Defendant in Error.

December Term, 1866.

Supplemental Argument for Defendant in Error.

I. The certificate of purchase in evidence, dated 23d February, 1864, does not connect itself with any statute or section by recital of its being issued by virtue thereof. It does say that the party named has made payment for the land under the provisions of the act of 21st April, 1858, and 13th May, 1861, and on presentation of this certificate to the governor shall be entitled to a patent.

To learn the effect of this certificate we must therefore examine the laws named to see if they authorize it, and if so, what are the provisions for the sale.

First we turn to the law of 13th May, 1861, and discover that the certificate is not issued under it, nor is payment authorized to be made by it.

This law has, however, a palpable object, for its machinery provides for the reclamation and segregation of the lands donated to the state by the act of Congress of 1850; as state, in 26 Cal. Rep., 357, "reclamation is one of the

objects avowed in its title, and one to which its provisions steadily refer."

Failing here to find the certificate of sale or payment provided for, we next pass on to the act of 21st April, 1858.

This we find to be a comprehensive act—its title being "to provide for the sale and reclamation of the swamp and overflowed lands of the state."

Its last section repeals the previous laws on the subject. It names the lands which are to be sold, (sec. 1,) provides for the manner of proceeding to purchase, requiring an affidavit that the land "is sought for the purpose of settlement and reclamation;" (sec. 2,) the purchaser then has the land surveyed, and after its approval by the surveyor-general, he may then pay for it, (sec. 4,) whereupon he procures a certificate of purchase, (sec. 6,) which "shall be prima facie evidence of title," (sec. 7.) The expense of survey and purchase are to be paid by the buyer, (sec. 12.) The proceeds of the lands sold are to be "credited to the account of a swamp land fund, to be appropriated for the reclamation of said lands," (sec. 1 and 5.)

The lands within the County of San Francisco, and within five miles of any town, are excluded from the act, and salt-marsh lands are reserved for six months, except from parties holding "adjoining arable lands." Section *one* says: "PROVIDED, *That if upon the survey of such lands, any portion thereof shall be found to be lands belonging to the state by right of her sovereignty, the moneys arising therefrom shall be paid into the treasury * as other state revenues.*"

An amended act, approved April 18, 1859, was passed, which is immaterial except the first section, which provides a new affidavit, of which 26 Cal. Rep., 357, says: "The facts of the affidavit are to be regarded as tests of character" of the land embraced in the act. The facts so to be stated, and which constitute the tests of character, are thus set out in the affidavit: "That every forty-acre lot * of the land sought to be purchased is the greater

part swamp or swampy, or subject to inundation at the planting, growing, or harvesting seasons, so as to endanger, injure, or destroy the crops, taking the average season for a reasonable number of years prior to A. D. 1850, *as a rule of determination.*"

The purchaser shall then cause the land to be surveyed.

It will be observed that under these laws the applicant to purchase, at his own expense, causes the lands to be surveyed and designated, subject to the approval of the surveyor general.

The act of 13th May, 1861, originates a new system as to survey and designation, and also provides for the reclamation of the land. It constitutes a permanent board to carry out the system of reclaiming the lands, including those sold and unsold.—(Secs. 1 to 19.)

They are to appoint an engineer, who is to examine and survey the land, who shall, "with the plat of such examination and survey, return an exhibit, showing the levels of the country surveyed, the average depth of water in winter and summer, *the sources from whence the water flows in to cover the land*, the height and width of embankments necessary to *prevent overflow*, the depth and width of sloughs to be filled, the work necessary to be performed for the reclamation of the tract of country," &c.—(Sec. 4.) The engineer then assists in making plans and specifications for such reclamation (secs. 5, 6); after which the work is to be let to the lowest contractor.—(Secs. 7, 8.) Sections 9, 10, 11 provide for completion and payment for such work, and so on to section 18. Having thus provided for the reclamation, the act goes on to direct how the segregation shall take place, in section 19. The county surveyors here are the agents; they are to make maps of all the swamp lands, including those sold and those not sold, with a tabular statement showing the title. They then shall procure affidavits to be made by witnesses "that *all of such lands* that are embraced within the said survey, [which survey section 19 had directed,] and

exhibited on the map, *are swamp and overflowed lands,* * * and procure all the evidence they may deem sufficient to substantiate the fact that such lands are swamp and overflowed lands, and transmit the same to the surveyor general."—(Sec. 19.)

One copy of this survey and map is to be retained by the county surveyor, and "another copy, accompanied by affidavits, as in the act required, covering the whole tract of swamp and overflowed lands, exhibited as such on his map, * shall be filed with the surveyor general as hereinafter required. And the county surveyor shall, at the same time, report to the surveyor general a description of the land returned and mapped as swamp and overflowed, showing the *cause of the overflow of the land,* and a general description of the *sloughs* or *creeks* through which the waters enter into the low lands." (Sec. 20.)

This is the map and survey spoken of on p. 8 of the Record, under point 2 of finding of facts, which says, it is "within the exterior boundaries" thereof, "and is * * below ordinary high water mark," * "and upon the margin of the bay of San Francisco." The facts found do not state that it is the description of land required to be established by said affidavits, but show the contrary.

Sec. 21 proceeds: "the surveyor general shall compile a general map" from the county maps, showing all the lands, and numbering the same, so as to correspond with the affidavits made in relation thereto; he shall compile from such testimony a schedule of the swamp lands, and the map, schedule of lands, and (original) affidavits shall be transmitted to Washington, as an exhibit of the lands claimed, with request that the United States may certify the same to the state. (Sec. 21.)

Thus it appears that this map can contain no lands unless the evidence of competent witnesses "substantiated the fact that such lands are swamp and overflowed lands." (Sec. 19.) The plaintiff's certificate of purchase refers to

this law as one of the two under which the purchase was made.

Sec. 26 says, after such survey and segregation has been made, any person desirous of purchasing "swamp and overflowed lands," shall file an affidavit that he has not purchased any other swamp lands which, with those sought to be purchased, will exceed 640 acres; and it shall be the duty of the county surveyor to make out a plat and field notes for each applicant, and forward the same to the surveyor general, in accordance with the act of April 18, 1859.

The 27th section says: "The provisions of this act shall apply equally to all salt-marsh or tide lands in this state as to swamp and overflowed."

After the surveyor-general receives the plat from the county surveyor, by sections 3, 4, of the act of 1858, and amendments, by sections 1, 2, of act of 1859, it is his duty to certify back to the county surveyor the correctness thereof, whereupon the applicant may purchase the land.

From this review of the provisions of the laws, it is apparent that the act of 1861, May 13th, prescribes, more stringent safeguards, to limit the sales to be made under it to the class of lands described, than did the act of 1859.

The act of May 13th, 1861, confines the officers who make the plats to the lands that the affidavits will apply to. Section 19 says: "It shall be the duty of the county surveyors to procure such testimony * * that *all of such lands* that are embraced within the said survey, and *exhibited* on the map, are swamp and overflowed lands." That this means that character of lands within the act of Congress of 1850, is shown by the use that is to be made of such testimony, viz: to be sent to Washington, on which to procure the final act of the land office, in certifying what lands the state obtains under the act of 1850.

It appears plainly that the object of the acts of 1858, 1859, and 1861, is the disposition and management of the

lands donated to the state by the swamp and overflowed law of 1850; each act being more specific and stringent in its provisions to confine the machinery of it to that object, than the preceding law.

The 27th section of the act of 1861, standing alone, would seem to add another class of lands to those embraced in the act of Congress. But this section must be construed so as to harmonize with the main object of the act, if it will do so. If it be held to add a class of lands, the sale of which is not provided for by the other provisions of the same act, and not embraced within the scope of the acts of 1858 and 1859, then it stands as either repugnant thereto, or as remaining inoperative until further legislation shall prepare the machinery to dispose of this new class of lands.

But another law—that of 14th May, 1861; which contains a designation of lands as large as that of 13th May—says that "the sales of all marsh and tide lands * that have been made in accordance with the provisions of any of the acts of the legislature for the sale of swamp and overflowed lands are hereby confirmed; and any of said marsh and tide lands that remain unsold may be purchased under the provisions of the laws now in force providing for the sale of swamp and overflowed lands."

In Morrill vs. The People, (26 Cal., 336,) this law of 14th May was construed—the words "marsh and tide lands" were held not to include lands below ordinary high water mark, within the daily ebb and flow of the tide; (p. 353,) and to embrace lands reclaimable only for cultivation and the raising of crops, within the description given by the affidavit of the act of 1859. On page 355 the court cites the language of the affidavit of the act of 1859—"swamp or swampy or subject to inundation at the planting, growing, or harvesting seasons," &c., saying; if the legislature intended to offer all the lands for sale owned by the state by right of its sovereignty, a description so labored and inapposite would not have been used:

the lands in the patent are neither swampy, nor is there any sensible connection between them and the "seasons" nor "crops."—(On p. 356.) "But the nature of the facts to be set forth in the affidavit, fix the character of the land to which the affidavit was intended to apply, * * the only land which the legislature intended should be sold. * * The facts of the affidavit are to be regarded as *tests of character*," and exclude both uplands and such as are embraced in the patent. The record showed these lands to be a strip of rocky and sandy beach upon which a surf runs at ordinary high tide, and extending into the deep sea—a cliff 250 feet high rises about 10 feet distant, and back of this narrow strip no part of the tract was fit for cultivation.

In connection with the act of 14 May, was construed the proviso to the 1st section of the act of 1858 above cited, which the court say is to be read in the light of the subject-matter of the act. "Portions of the swamp lands known as *salt-marsh* are threaded by channels of greater or less width within the ebb and flow of the tide, which channels are of little or no use, either for fishing or navigation. They are but extensions of the mud flats and like them belong to the state by right of its soverignty. While the principle purpose of the act was to sell the swamp and overflowed lands, * * still it was considered "that purpose" could be best subserved by *allowing purchasers of salt-marsh* to include such channels, when reasonably necessary, within their surveys. To that extent, and under such or kindred circumstances, * lands of the state, held by reason of her sovereignty, were offered for sale by the act of 1858." The legislature considered the proviso but a relaxation of the rule "in favor of a case which it regarded as exceptional."

Not only was the act of 14 May construed, but the act of 13 May was also then in force, and is noticed by the court thus: "reclamation is one of the objects avowed in its title, and one to which its provisions steadily refer."

ARGUMENT.

If we now examine the certificate to determine its legal effect, we find, first, that it is "*prima facie* evidence of title," (sec. 7, act of 1858,) which would be the least effect that would be given to a patent.

I. It is contended that if the lands in question were not of the class authorized to be sold, the officer including them in the certificate has done an act without authority of law and void.—(Wilcox vs. Jackson, 13 Pet., 498, 511; Stoddard vs. Chambers, 2 How., 284, 318; U. S. vs. Stone, 2 Wall., 525.)

II. It appears from the record that the land in question is not state tide land within the meaning of the act of 1858, 1859, "under the provisions of" which alone is the sale authorized by the act of ~~14th~~ 13th May, 1861.

Morrill v. People, 26 Cal., 336, shows that land reclaimable for cultivation only, "subject to inundation at the planting, growing, or harvesting seasons," &c., is the main object of the law, and, as a mere accession thereto, when, by actual contiguity, it may be reasonably necessary to embrace lands threaded by these small channels, which make them mere extensions of the mud-flats, then, to that extent, and under such or kindred circumstances, state tide lands may be added to the regular ~~and~~ swamp and overflowed lands. Thus to make the law embrace any tide land it must be shown, first, that swamp land has been bought and that the tide land is reasonably necessary to its use. Unless this is done the case is not made out. Not only does the record not show this, but it proves the contrary. 1st. In the "complaint" the land is described as a lot of ground in the city of San Francisco, of fifty by one hundred feet—in block twenty on the map of said city. In the facts found it is stated to be "upon the margin of the Bay of San Francisco," and "below ordinary high-water mark."

This description of it shows, that it is as clearly outside of the meaning of the swamp and overflowed acts as was the land described in Morrill's case; and a glance at the *locus in quo*, guided by the lines projected on the maps called for, will show an unbroken surface of water between the bridge on which it fronts and the "main land." Opposed to all this evidence of its inapplicability with the lands contemplated by the laws in question is the statement;—not that this particular lot, but "the land lying between the bridge and the main land does not form part of the *navigable* portion of the Bay of San Francisco,"—(which implies that it does form some portion of such bay)—"and is easily reclaimable, and will soon (not by the mode for reclamation provided by said laws, but) by reason of the natural growth of the city, be converted into solid land, and covered with buildings."

It is thus apparent, that it is not reclaimable within the meaning of the facts required by the affidavit of the act of 1859; which same facts are made a part of the proceedings of the act of ~~14~~ 13th May, 1861, and must be ascertained, and established by affidavits of witnesses, before the county surveyors and surveyor general can perform the duties required of them by law.

If reclaimable, is it not in San Francisco bay, instead of an appendage to some other body of swamp and overflowed land, donated to the state by the Arkansas swamp act law of 1850. In connection with the exclusion of all lands within five miles of any town, and of all lands within the city and county of San Francisco, it is impossible to believe, that the legislature intended by the reclaiming act of 13th May, 1861, and by the 27th section alone, to subject to sale the future city front along its bay, but now lying far from shore, covered perpetually by the water of the ocean; under a system of laws framed for the purpose of disposing of agricultural lands.

It is admitted that swamp and overflowed lands within San Francisco are excluded from sale by the act of 1858,

and plaintiff insists that that act is the one he relies upon; and it is called for in his certificate; and the supreme court of California in Morrill vs. People, 26 Cal. Rep., 336, hold that act, in connection with the act of 14th May, 1861, which uses language equivalent to that of the 13th May; (all marsh and tide lands;) does not authorize the sale of lands below ordinary high water mark. At the instance of both parties to the record; by their agreement; facts are made a part of the entire case, which rendered it unnecessary for the defendant to offer further evidence in bar of plaintiff's action. The case does not stand on his certificate alone, but upon the other facts in connection therewith.

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